

THE
DECISIONS.
OF

The Court of Session,

FROM

Its first Institution to the present Time.

Abridged, and Digested under proper HEADS,

In Form of a DICTIONARY.

Collected from a great Number of MANUSCRIPTS, never before published, as well as from the printed DECISIONS.

V O L. I.

E D I N B U R G H.

Printed by RICHARD WATKINS, One of His Majesty's Printers, for himself, ALEXANDER KINCAID and ROBERT FLEMING. Sold by the said *Alexander Kincaid*, at his Shop above the Cross,

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12



A LIST of the several Collections of Decisions from which this Work is taken, with the Periods of these Collections.

- S**INCLAIR's practicks, from June 1540, to February 1548. MS.
 Sir RICHARD MAITLAND of Lithingtoun, from December 1550, to July 1565. MS.
 ALEXANDER COLVIL commendator of Culrofs, from March 1570, to April 1584. MS.
 HAMILTON Lord Haddington, from 1592, to July 1624. MS.
 Sir ALEXANDER GIBSON Lord Dury, from July 1621, to July 1642. Printed.
 Sir GEORGE ERSKINE of Inverteil, from 1621, to 1642. MS.
 Sir JOHN GILMOUR of Craigmiller, from July 1661, to July 1666. Printed.
 DALRYMPLE Viscount of Stair, from July 1661, to July 1681. Printed.
 Sir JOHN NISBET of Dirleton, from December 1665, to June 1677, Printed.
 Sir JOHN BAIRD of Newbyth, from November 1664, to February 1667. MS.
 Sir PETER WEDDERBURN of Gosford, from June 1668, to August 1677. MS.
 Sir DAVID FALCONER of Newton, from November 1681, to January 1686. Printed.
 Sir JOHN LAUDER of Fountainhall, from 1678 to November 1712. MS.
 Sir HUGH DALRYMPLE of Northberwick, from June 1698, to December 1718. MS.
 Mr. WILLIAM FORBES Advocate, from February 1705, to November 1713. Printed.
 Mr. WILLIAM FORBES Advocate, from November 1713, to July 1714, MS.
 Mr. ALEXANDER BRUCE Advocate, from November 1714, to August 1715. Printed.
 Mr. ALEXANDER BRUCE Advocate, for 1716 and 1717. MS.
 Mr. HENRY HOME Advocate, from November 1716, to March 1728. Printed.
 SPOTISWOOD,
 BALFOUR, }
 HOPE, } Collected in form of a dictionary, and the decisions
 BALMANNO, } they observe are before the restoration.
 NICOLSON, }
 Sir ROGER HOG of Harcus, in the same form, from 1681, to 1691. MS.

N. B. SPOTISWOOD alone is printed, the rest are in manuscript.

St. Roger's Hoc of Hanc, in the same form, Nov. 1882, to

P R E F A C E.



*I*N Scotland, where we have so little written law, and where our judges depend, in a great measure, upon practice and precedent as their guides, it must be an useful design to digest the decisions of our sovereign courts into one body. The decisions of the court of session were beginning to be bulky, and to be unwieldy by their bulk. So much I dare venture to say in behalf of the present work, that these decisions may now more easily be come at than formerly.

*I*F we form to ourselves the notion of a people, rough and unpolished, novices in the arts of life, learning but beginning to dawn amongst them, we shall not hope for great matters from the courts of law established in such a country, at their first setting out. This was pretty much the case of Scotland, when the court of session was instituted. In those days, the arts of war were more cultivated among us than those of peace; and therefore, we cannot expect to find the first judges of that court, all of them, men of profound learning, or of deep knowledge in the science of law. And if we join to this another reflection, that there is no art nor science which requires more time than jurisprudence to ripen it and to bring it to a standard, we shall have no reason to be ashamed, tho' the decisions of our court should be found inferior to those handed down to us by the Roman lawyers, who wrote late, and after their law was brought to a maturity by long experience: For this is no more than what must happen in the natural course of things.

*W*ITH regard to every sort of improvement, the comparison is not equal betwixt a country, which has flourished for the space of a thousand years, and another which has enjoyed scarce any of the arts of life for the fifth part of that time. Let us take the first period of the Roman law, corresponding to that of ours, and perhaps the comparison will not be found disadvantageous to us. Nay further, without danger of partiality, we may affirm, that our law has made a swifter progress than that of the Romans: And no wonder, considering the lights we had from their authors, excellent guides in the science of jurisprudence. They had no such guides to follow.

*T*HERE are eminent men among us, who, without giving any allowance for the slow progress of law, chuse to talk with little regard of our decisions. Thus they who have reached the summit, are apt to neglect the steps by which they mounted; not considering the benefit such aids afford to others. I know not if a treatise concerning the advantages that may be reap'd from our decisions, and concerning the proper weight that ought to be laid upon them, would tend to remove such prejudices. Till such a work be produced, the following short hints may be of use.

IN the first place, Decisions upon arbitrary questions, points of form, and such like, ought to have the outmost weight and authority: For, with regard to matters of this nature, it is of great importance, that there be a fixed rule publickly known, but of very little importance what the rule be.

AS to cases, which ought to be determined from principles universally agreed upon, I acknowledge that decisions ought there to have no authority. If the deduction upon which the decision is founded be fair, the decision is just; but then reason is the authority, not the decision. If the decision be founded upon wrong principles, or concludes falsely from true principles, it can signify nothing: And in these matters every man must judge for himself.

BUT then I venture to affirm, that he has not thoroughly considered the matter, who shall conclude from thence, that decisions of the sort now mentioned are entirely without use. Tho' they have of themselves no authority, yet when collected with judgment and accuracy, they may be considered as so many regular treatises upon particular subjects: And being founded on experience and common life, must very far exceed what can be produced from mere speculation within the walls of a college. Our law comes thus to be enriched with new thoughts, new discoveries, new arguments, struck out by the invention of our lawyers. I could point out one man, to whom we are extremely indebted for his admirable talents in this way, and who has done more to ripen our law, and to advance it towards perfection, than perhaps all that have gone before him.

BUT there is a further benefit, and no insignificant one, that may be reap'd from such decisions. Most of our knowledge, especially that of law, is by induction. It must, therefore, be of singular use to such as apply themselves to this study, that there are at hand a great number and variety of cases, ready invented, upon which they may exercise their reason. Every one must be sensible, who is ever so little acquainted with the Roman law, how hard some of the authors have been put to it for cases and examples to illustrate their doctrines, and what poor ones, after all, they employed, when they were reduced to invention. And no wonder, since invention is, perhaps, that which requires the greatest reach of genius. It seems plain then, that a variety of law cases, tho' but barely proposed, must be of advantage: They are a stock of materials for the mind to work upon; an opportunity is afforded us to apply principles, the judgment is exercised, and by exercise ripens to its perfection. How much more useful must it be, to have upon every one of these cases the opinion of the judges, founded, I may be allowed to say, for the most part, upon solid principles? And as to the few decisions that may be erroneous, 'tis no disagreeable work for a man of genius to be occasionally employed in detecting the fallacies, and correcting the mistakes that may ly in them.

I WILL venture to go one step further, and affirm, that even erroneous decisions may, perhaps, be of some use. An applauded author, thoroughly unexceptionable, makes the work too easy for his readers. We are apt to trust to him, to repose ourselves under his authority, and lose ourselves

ourselves in indolence and inattention : Whereas the discovery of one error puts a reader upon his guard, and renders him suspicious of his author ; he allows nothing to pass without examination ; every proposition is weighed and canvassed ; and by this means every part comes to be digested in his mind, till at last he becomes master of the whole.

AFTER all, I trust it will be found, upon trial, that there is as little clashing among the decisions of our court of session, at least since the restoration, as can well be expected, considering that our law is as yet scarce past its infancy. It is true, an alteration of circumstances has produced opposite decisions in different ages : For instance, moveable tenants of old were not admitted to bear testimony for their master ; at present they are admitted ; and the reason is good in both cases : Of old the common people in Scotland were little better than slaves ; they are now somewhat more independent, and it is not for want of safety if they chuse not to speak the truth, whoever be the party. Cases of this kind cannot be ranked among the antinomies of the law ; on the contrary, the law of that country is wrong which does not accommodate itself to the fluctuating manners of the people.

I SHALL close this subject with one further reflection. It certainly was once our misfortune that we had so little statute law ; the judges, mostly unconfined, were left too much to be guided by fancy or inclination. This misfortune however was but temporary, it lessen'd by degrees, in proportion as our law came to be more and more ascertained in the course of practice. After it shall be brought to a standard, (which may be expected in length of time, if due care be taken of providing us with able judges) what was originally our misfortune, will turn out to our advantage. Statutes, tho' commonly made with a view to particular cases, do yet enact in general upon all similar cases ; and as man is but short sighted with regard to consequences, 'tis odds but, in remedying one evil, a greater is produced. A court of justice determines nothing in general ; their decisions are adapted to particular circumstances. If upon any occasion they chance to stray, 'tis but to return again, with greater certainty of the road. They creep along with wary steps, until, at last, by induction of many cases, which have been fix'd in the course of practice, a general rule is with safety formed. And for a proof that there is something here beyond mere fancy, let any one who is curious, run over our law in this view, and he will find, that those branches of it, which have been modelled by the court, are, generally speaking, brought nearer a standard, than those upon which statutes are most frequent.

AS for the present work, the author is extremely sensible of its defects, after all the time and thought he has bestowed upon it : He only begs liberty, by way of apology, to put his readers in mind, That digesting a body of law is no easy task for a single hand : And 'tis no favourable circumstance for him, that it is a sort of levelling work ; the more labour is bestowed, the less work appears to have been executed. After all, it would seem more natural to enquire, why such a laborious work was attempted at all, than why more time and pains were not bestowed on it. Tho' one would willingly contribute his mite to the publick, the imposition is rather unequal to exact his whole stock, and

leave him nothing for private life and social commerce. Life is short, at any rate uncertain, and man is a being not made for tedious undertakings.

SUCH as the work is, the publick is welcome to it: Of some use it may be. In suppressing it, the author had possibly more consulted the interest of his reputation; but this would be preferring himself to the publick; and surely the man deserves little excuse, who would not run the hazard of being thought ignorant by others, rather than by under the self condemnation of want of zeal for his country.

BECAUSE this work is formed upon a new plan, it was thought proper to give some notion of the distribution, by a few examples, where the method, if not explained, may appear somewhat perplexed.

A CHARTER being granted to a proprietor of land, containing an exemption from an antecedent thirlage, this may be founded on by a singular successor, in the way of defence against a declarator of thirlage, tho' he does not connect with the person to whom the charter was granted. Under what head are cases of this sort to be ranged? Three heads offer themselves, *Accessorium sequitur principale*, *Jus tertii*, Personal and real. If the question turn'd upon this point, Whether the defender could be allowed to plead upon a charter, which did not belong to him, but to a third party, the head of *Jus tertii* would challenge the preference. But as, upon a more accurate inspection, the case appears to resolve itself into a *Denegatio actionis*, that the pursuer has no servitude of thirlage upon the defender's lands, having renounced the same, it would come more naturally under Personal and real. But there is a separate consideration that has made me fix upon the first head, to wit, That the case in hand is intimately connected with another, that comes properly under the first head, and under no other: It is this, Thirlage once acquired to land goes along with it to every singular successor, tho' not connecting with the proprietor who acquired the thirlage. And to favour this distribution, the case proposed may be naturally enough conceived after this manner, That the freedom or immunity obtained indeed by a third party, but to the ground, comes out to be of the nature of a real quality of the ground, which must go along with it to every proprietor.

A BOND being assigned, all legal diligence done upon it, goes along, tho' not express'd in the deed of conveyance. It may be doubted whether this case falls under *Accessorium sequitur principale*, or under *Implied Assignment*. If the diligence be considered as a proper accessory, which, from the nature of the thing, must go along with its principal, the first is the proper head; but if the matter be taken up upon this footing, That the diligence was intended to be conveyed, the last is the proper head. Without pretending to determine so nice a point, I have followed this course, to put under *Accessorium sequitur principale*, those cases only where there can be no intervention of Will, and under *Implied Assignment*, those cases where Will may intervene, and where the conveyance of the accessories may have been intended.

UNDER Clause are placed, not only questions about the meaning, but also about the import of clauses; with this restriction, That where questions about the import of clauses fall readily under other heads, I have placed such questions there: For example, import of clauses in tacks or rentals, under Tack. A clause, whether it infers an obligation, or only a resolution, under Obligation. Import of clauses in marriage-settlements respecting children, under Provisions to Heirs and Children, but respecting the wife or husband, under Clause.

UNDER Condictio indebiti those cases are put, where a preferable creditor has repetition of principal sums uplifted by one less preferable. But where the question is about annualrents, it is to be found under Right in Security: Because this resolves into another question, Whether a right in security is an exclusive title, with regard to the annualrents, as it is with regard to the principal sum.

DAMAGES arising from breach of contract, under Damage and Interest; arising from other facts and deeds, under Reparation.

IT was necessary to have one head for Implied, and another for Presumption, tho' they are apt to run into one another. The best idea I can give of the distribution, in a few words, is, That under Implied, my scheme was to range those cases where the dispute turns upon a legal deed, whether any further meaning or thing can be drawn from it, than what is express'd or directly done, and what that further meaning or thing is: Under Presumption to range all other cases, where a party's will, meaning or intention is gathered from collateral circumstances. Virtual is readily to be distinguished from these two, for there the Will of parties is supposed, and the question is, What effect in law a party's will, so and so express'd, can have; as for example, an obligation to grant a tack, is said to have the same force and effect with a formal tack, as being virtually a tack. Here nothing is inferr'd or implied; all is done that was intended, and the question only is, what legal virtue or efficacy it has.

MOST of the articles relating to homologation fall regularly under Presumption, being no other than consent presum'd from facts and circumstances; yet I have chosen to keep homologation separate, partly because it is a well known term in law, and partly because there is one branch of homologation which falls not under Presumption, to wit, supposing the consent, what it can operate, as, whether deeds ipso jure null are capable of homologation.

TO settle marches among Consolidation, Innovation, and Implied Discharge, the following examples will serve. A person who has a tack, infestment of annualrent, or other real servitude, purchasing the land, these rights are swallowed up and sopite; this under Consolidation. A proprietor of land taking a tack of the same from a third party, whether this be not a renouncing of his property, under Implied Discharge and Renunciation. Again, a creditor in an infestment of annualrent accepting of a wadset, the debt due by the infestment of annualrent being made a part of the wadset sum; this cannot come under Consolidation, because two rights in security are consistent; nor under Implied

Discharge, because here there is nothing implied, the debt due upon the infestment of annualrent being plainly discharged, as being partly the onerous cause of the wadset; and therefore I have chosen to put this and such like cases under Innovation.

THE peculiar nature of the debts upon which the several diligences, arrestment, adjudication, &c. may be founded, come under these respective heads, as also the subjects affectable by the different diligences; because depending upon the peculiar nature of the diligences. But in what cases diligence may be raised before the term of payment, upon conditional obligements, upon illiquid or uncertain claims, such questions, depending either upon the circumstances of the debtors, as being vergentes ad inopiam, or upon the nature of the diligence, prohibitory or executive, I have chosen to put all under one leading word, viz. Legal Diligence. And to fill up this head, I have also brought under it this subject, when real securities are loosed, and the debt becomes personal, so as to be the foundation of diligence: Also, whether diligence can go upon obligations without the intervention of a decret, &c. There is a separate branch, which will also be expected under this leading word, "When diligence is done before the debt is fully established in the creditor's person, or when the foundation of the diligence is any way defective, how far this will vitiate the diligence, or if the defect may be supply'd ex post facto;" But this I have chosen to put under Quod ab initio vitiosum, being more nearly connected with several other subjects that fall under that head.

A CREDITOR may use any personal privilege or faculty competent to his debtor, as a means to make his claim effectual: And reasonably, it being a rule, That a man can withhold no available interest from his creditors; and as there is no legal diligence contrived in our law for affecting or carrying powers, faculties, and personal privileges, there is a necessity creditors have the liberty of using their debtors powers, faculties and privileges, as he himself might do; for this reason, where the question is, Whether a reduction ex capite lecti, ex capite minorennitatis & læsionis, &c. is competent to creditors, I have placed such cases under Personal and Transmissible.

TO keep the following heads distinct, Provisions to Children, Service and Confirmation, Title to pursue, know, that under Provisions to Children are ranged all questions, whether the children are to be held as creditors or as representatives only; the next question is, in what cases the law supersedes the necessity of service or confirmation; this comes under Service and Confirmation. Supposing now service or confirmation necessary, the third question is, In what cases the law indulges people to commence process, without making up their titles; cases of this kind must come under Title to pursue. For example, where the question is, Whether a provision in a contract of marriage requires a service, yea or not. As this plainly resolves itself into another question, Whether the children are creditors by the tenor of the deed, or only heirs, it must be look'd for under Provisions to Children. Again, whether the annat needs confirmation, must be look'd for under Annat, because it depends upon this, whether the annat accrues jure repræsentationis or jure proprio. In prosecution of this method, actions which an apparent heir can pursue in his own right, are not to be placed under

under Title to pursue, but under Heir apparent: Exhibition ad deliberandum is a proper example. But, queritur, Is the action for aliment of this kind, or the reduction ex capite lecti? I have chosen to put them under Title to pursue.

WHEN the question is, Whether it be a proper substitution, or only a conditional institution, this under Substitute and conditional institute. Where it is yielded to be a conditional institution, and the question is, Whether the condition has failed or not, this under Condition. Positus in conditione, an censetur positus in institutione? This again being a question, whether the person named in the condition, is to be understood as called to the succession, provisione hominis, or left to the provision of law, it comes naturally under Succession a testato.

WITH regard to writs vitiated, of a false date, &c. the subject is thus distributed, Where the question is, whether the vitiation is to be presum'd accidental or dedita opera, this under Presumption. Again, the presumption being, That it was dedita opera, whether the presumption can be taken off by a contrary proof, under Proof. And lastly, When the vitiation appears to have been done purposely, what weight this has against the writ, under Writ.

WHERE the question is with relation to a writ, whether formal or not, see Writ. But supposing it to be formal, what faith is given to it, see Proof.

BY this time the reader will be sensible that the author's principal aim in his distribution has been to make the ratio decidendi evident as far as possible, from the very place in which the decision is found.

N. B. AS the author begun this work upon an abridgement done by another hand, he will not take it upon him to answer for the exactness of the abridgement in every single instance, tho' he has been careful to consult the originals, wherever he had suspicion of error; and this gives him hopes the errors will not be frequent. Yet, after all, he is aware, that 'tis next to impossible, through the course of a long work, to carry on that strict application and attention, one may have at certain times. The mind must often flag, and in such intervals, is too apt to take things upon trust. The author has had occasion to discover this weakness in himself, too frequently, to be ignorant of it, and of its consequences. In a word, as to faults that may be discovered in the distribution, he acknowledges they must be charged wholly upon himself; but as to errors committed in abridging the decisions, they may be partly owing to another.

H. HOME.

...This is to be understood as a preliminary statement of the author's position on the subject of the relation of the mind to the body. It is not intended to be a final statement, but rather a statement of the author's position at the time of writing.

...The author's position is that the mind is a separate entity, distinct from the body, and that it is capable of independent action. This position is based on the fact that the mind is capable of thought, feeling, and volition, which are not functions of the body.

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II. HOME

A

T A B L E

O F T H E

Several T I T L E S, with their D I - V I S I O N S.

A.

A Ccessorium sequitur principale. Page 1.

Adjudication and Apprising. 3.

- Adjudication *contra hæreditatem jacentem*.
- Adjudication in implement.
- Adjudication in security.
- Apprising.
- Adjudication upon act 1672.
- Decisions common to adjudications and apprisings. And, 1mo, Of the debt which is the foundation of the diligence.
- Pluris petitio*.
- Usurious stipulation.
- Exorbitant penalty.
- What subjects are carried by apprising and adjudication.
- General clause in apprising and adjudication.
- Adjudications and apprisings pass *periculo petentium*, and all defences reserved *contra executionem*, unless instantly verified.
- Exceptions against the ground of debt, reserved *contra executionem*, unless instantly verified.
- Adjudications pass *periculo petentium*, without necessity to instruct the debtor's right.
- Allowance of apprising and abbreviate of adjudication.
- Nature and effect of this diligence.
- Nature of this diligence.
- Effect of a simple decret of adjudication or apprising.
- A decret of adjudication or apprising, falls not by the debtor's death.
- Effect of an adjudication, with a charge against the superior.
- Personal diligence used by the appriser.
- Apprisers and adjudgers may be restricted in their possession to their neat annualrents.
- Ranking of adjudgers and apprisers.
- Apprisings and adjudications upon *debita fundi*.
- Adjudications in security.
- Adjudication in implement.
- Ordinary apprisings and adjudications.
- Legal of apprisings and adjudications.

(a)

Ex-

A T A B L E

Extinction of appraisings and adjudications.
Redemption of appraisings and adjudications.

Adultery. Page 23.

Advocate. 24.

Advocation. 26.

Art and Part. 28.

Aliment. *Ibid.*

And first, of the act 1491, cap. 25. anent alimentering of heirs.

The heir has a claim in his own right, without a service.

Who entitled to an aliment?

Heir renouncing not entitled.

Or if the estate be sold.

No aliment if the heir has other funds.

What if he has an employment?

Who bound to aliment?

Benefit of discussion amongst those bound to aliment.

An offer to aliment in family not relevant.

Donator of ward liable tho' he has not intermeddled.

Claim for aliment if good against assignies.

Modification of the aliment.

Aliment due *ex debito naturali*.

Father liable to aliment his children.

Mother liable.

Heir liable to aliment his brothers and sisters.

Modification of this aliment.

Children bound to aliment their parents.

Aliment by paction.

Alternative. 34.

Annat. 35.

Annualrent. 36.

Due *ex lege*.

Due *ex pacto*.

Due *ex mora*.

Due by tutors and curators.

Due by factors.

Due by consignaturs.

Due by executors.

Due by trustees.

Due by those who uplift sums bearing annualrent.

Due by those who are *lucrati*, as having had the use of other peoples money.

Due

of the TITLE S.A

Due to cautioners, mandatars, &c. as recompence for advancing their own money upon the constituent's account.

If due to creditors upon a bankrupt estate after a sale?

Annualrent allowed *ob favorem*.

What puts a stop to the course of annualrent?

Annualrent, Infestment of. Page 45.

If the annualrent right be a foundation for mails and duties.

An annualrenter cannot remove tenants.

Annualrent how extinguished?

Appeal. 47.

Apprentice. *Ibid.*

Approbate and reprobate. 48.

Arbitration. 49.

Power of arbiters.

Arbiters may be compelled to determine.

Summoning of witnesses.

Time of endurance.

Decree arbitral subscribed after expiry of the submission.

Overman.

Reduction of decree arbitral.

Arbitrium boni viri. 52.

Arrestment. 53.

Warrant of arrestment.

Formalities of arrestment.

Formalities of decree of forthcoming.

Upon what debts may arrestment be founded.

What subjects arrestable.

In whose hands may arrestment be laid.

Arrestment affects only bygones and the term current.

If it reaches *adquirenda*?

Arrestment laid on after the common debtor's death.

Decree of forthcoming after the common debtor's death.

Arrestment if it dies with the person in whose hands it is laid?

Breach of arrestment.

Loosing of arrestment.

Ranking of arrestments.

Assignment. 62.

Assignment not intimate, denudes not.

What rights are established by assignment, without necessity of intimation?

Simple retrocession sufficient, where the assignment is not intimate.

An assignment in trust being intimated, a conveyance to the cedent's creditor needs not be intimated *de novo*.

Assignment may pursue in the cedent's name.

Formalities

A T A B L E

Formalities of an instrument of intimation.
Intimation by what equivalent suppliable.
Intimation by process.
Intimation by payment of annualrent to the assigney.

B.

Bank. Page 65.

Bankrupt. 66.

Reduction by creditors who have done no diligence.

Onerous alienations not reducible upon this head of the act,
Unless alienations *omnium bonorum* granted in security,
Or alienations in favours of conjunct persons.
What understood a deposition *omnium bonorum* ?
Gratuitous alienations reducible.
What if the granter was solvent at the time of the gratuitous alienation ?
What understood a sufficient separate estate to bar reduction ?
Liferents how to be computed in this case ?
Second gratuitous alienation of the same subject reducible at the instance of the first, tho' the granter be not insolvent.
Provision in favours of a wife how far onerous ?
In favours of children.
Provisions made in contracts matrimonial, how far onerous ?
This reduction reaches *adquirenda* as well as *acquisita*.
Who reckoned prior creditors ?
This reduction, if good against singular successors ?

Alienation after diligence.

What sort of deeds reducible upon this head of the statute ?
Payments if challengeable ?
Contractions or alienations where money is instantly advanced, not reducible.
Reduction not sustained, unless the common debtor became insolvent by the alienation.
Inchoat inhibition, if sufficient to found the reduction ?
Charge of homing, if a sufficient foundation ?
This reduction, if competent against other creditors having done diligence ?
Effect of this reduction.
This reduction reaches *adquirenda* as well as *acquisita*.
If the creditor reducer has been *in mora* ?
Reduction of preferences granted by means of interposed persons.

Decisions upon the act 5, parl. 1696, for declaring notour bankrupts.

Has no retrospect.
Circumstances that infer notour bankruptcy.
Flying or absconding without insolvency, will not infer notour bankruptcy.
What sort of alienations falls under the sanction of the act ?
Delivery of moveables in satisfaction of debt.
A purchase for ready money not reducible.
What understood a purchase for ready money ?
If deeds are challengeable where nothing is given away, but yet a partial preference effectuated ?
Partial preference granted by means of an interposed person.
Effect of this reduction.

Disposition by a bankrupt in favours of his whole creditors.

Decisions upon the clause act 1695, declaring heretable bonds, &c. to be as if granted of the date of the fines taken thereupon.

If this clause concerns *nova debita* ?
Date of the fine is the rule, and not of the registration.

Base Infeftment. 87.

How far effectual without possession ?
Preferred as of its date, if possession is insisted in *sine mora*.
Process of mails and duties, or pointing the ground, makes it publick.

Con-

of the TITLES.

Confirmation makes it publick.
Payment of annualrent makes it publick.
Husband's possession, the wife's possession.
Father's possession, if the son's possession?
Reverſer's poſſeſſion, if the waſſetter's poſſeſſion?
Poſſeſſion of the principal lands, is poſſeſſion of the warrandice lands.
Infeſtment of relief, if valid without poſſeſſion?
Poſſeſſion of a part, if it validates as to the whole?

Baſtardy. Page 92.

Baſtard's children ſucceed to him.
Strangers may ſucceed as heirs of proviſion.
Baſtard's relict has her legal intereſt.
If the baſtard's iſſue fail?
Baſtard has not *teſtamenti factionem*, unleſs he leave lawful iſſue,
Or unleſs he be legitimate.
If the baſtard's effects fall to the Lord of regality?
Donatar of baſtardy, how far liable to creditors?

Battery. 93.

What underſtood a battery?
The act to be underſtood of the firſt aggreſſor.
Premeditated deſign to provoke.
In whoſe favours the act directed?
Effect of a battery.
The act has place, before whatever court the proceſs be carried on.
Battery how ſopite?

Beneficium Competentiæ. 95.

Bill of Exchange. *Ibid.*

Money the only ſubject of bills.
Nature of a bill.
Gratuitous bill null.
Bearing annualrent or penalty.
Subscription of the drawer a neceſſary requiſite.
Good, tho' wanting an addreſs.
Wanting, *to order*.
If intimation is requiſite?
Effect of an indorſation.
Acceptance not preſumed of the date of the bill.
The porteur's action againſt the perſon upon whom the bill is drawn.
The perſon upon whom the bill is drawn is bound to accept, if he is poſſeſſed of the drawer's effects, or has given orders to draw upon him.
Extraordinary privileges of bills.
Bills having no extraordinary privileges.
Acceptor how liable, if *in mora* of making payment?
Acceptor's recourſe againſt the drawer.
Value not preſumed to be in the acceptor's hands, unleſs expreſt.
Acceptance by a third party, upon whom the bill was not drawn:
Poſſeſſor's recourſe againſt the drawer.
Value preſumed given to the drawer by the perſon in whoſe favours the bill is drawn
Unleſs drawn payable to a creditor.
The preſumption has not place in precepts for victual, &c.
Bills muſt be negotiated.
If the ſame hold in precepts granted to creditors?
What underſtood ſufficient negotiation?
Excuses for failure of negotiation.
Effect of neglecting to negotiate.
Bills by the lapſe of time loſs their privileges.

(b)

Bills

A T A B L E

Bills by the lapse of time lose their extraordinary privileges, and come to be of the nature of any common obligation.
If they lose their ordinary privileges, and cease to be probative by a longer lapse of time?

Blank Writ. Page 103.

Granting a blank-bond implies a renunciation of all exceptions competent at the time.
But not of exceptions afterwards emerging.
Blank-bond requires intimation, and all exceptions emerging betwixt the date of the bond and intimation will operate against the assigney.
Blank-writ lying by the creditor at his death.
Decisions upon the act 25th, parl. 1696.

Bona & mala fides. 104.

Bona fides non prodest adquirere volentibus.
Private knowledge of a prior right.
Indorsee's private knowledge of exceptions competent against the indorser of a bill.
Ignorantia juris.
Command of a superior, how far it infers *bona fides*?

Bona fide Consumption. 107.

Saves from repetition of the fruits, not of the value or price of the subject itself.
Saves from repetition of the fruits, but not from extinction of any extinguishable right in the possessor's person.
Possession upon a right good *ex facie*, tho' liable to objections.
Possession upon a right null *ex facie*.
Private knowledge of a preferable right.
If a preferable intestment without interpellation will induce *mala fides*?
Reduction of the author's right, if it will induce *mala fides* against the acquirer, without interpellation?
Defunct's goods intromitted with, and applied before his estate was gifted.
One heir-portioner intrometting with the whole rents, believing the other dead.
Minor qui non tenetur placitare, is a *bona fide* possessor, tho' his right should be reduced after majority.
Bona fide possessor of teinds.
Mala fides induced by process, whether it will take place from citation, liti-contestation, or decret?

Bona fide Payment. 111.

Tenants paying their rents.
Payment to a minister after he had fallen from his right.
Payment made to one who is not the true creditor.
Payment to a creditor denuded, and the conveyance intimated, but not to the debtor personally.
It must be actual and real payment.

Bond of Presentation. 114.

Debitor must be presented in terms of the bond, and instruments taken thereupon.
Mora in implementing.
Excuses for not presenting.
Clause to present free of suspension, &c.

Brevi manu. Page 115.

Stolen goods may be seized *brevi manu*.
King may enter *brevi manu* into possession of his annexed property that had been alienated.
Intromission

of the T I T L E S.

Intromission with teind *brevi manu*.
Donatar *brevi manu* intrometting with the rebel's moveables.
Intromission with goods impledged.
Intromission with a tenant's corns.
Custody of an infant taken *brevi manu*.
If a miller can *brevi manu* seize corn abstracted?
A mill once set a-going cannot be demolished *brevi manu*.

Burgh-royal. 117.

Set of the burgh.
Government of the burgh.
Deacons have no jurisdiction.
Who liable to burghal services and prestations
Burgeffes cannot exercise plurality of crafts.
Non-residing burgeffes.
Monopolies whereby unfreemen are restrained from exercising craft within burghs.
How this privilege may be exercised.
Unfree traders.
Magistrates bound to furnish their town-house to justices of peace.
Privilege of arresting debtors for debt contracted within burgh.
Act 1693, anent communication of trade.

Butchers. 120.

C.

Captive. 120

Cautio judicio fisti & judicatum solvi. *Ibid.*

Cautio judicio fisti.
Judicatum solvi.
As law will.
Who must find caution *judicio fisti*?
Advocation if it liberates the cautioner acted in the inferior court?

Cautio Juratoria. 121.

Cautio de rato. 122.

Cautio mutiana. 123.

Cautioner. *Ibid.*

When understood cautioner when *expromissor*?
In what cases a cautioner may remain bound, when the principal gets free?
1mo, If the subscription of the principal be null.
2do, Principal free as *vestita viro*.
3tio, Free by prescription.
4to, By minority.
5to, By a pactum de non petendo.
6to, Principal not bound, yet intrometting.
7mo, Where there is no proof of the debt against the principal.
Cautioner how far liable?

A T A B L E

If a cautioner may plead in the creditor's right, without being assigned to the debt ?
 Cautioners how liberated ?
 Cautioners entitled to relief.
 Diligence competent to cautioners for relief.
 What distress sufficient to entitle the cautioner to relief ?
 Relief in what cases it may be demanded without distress ?
 Extent of this relief.
 A cautioner paying, and insisting for relief, is liable to all objections competent against the debt.
 Cautioner in a suspension.
 In a second suspension of the same debt, a new cautioner is not required.
 In what cases is the cautioner assailable, while the letters are found orderly proceeded against the suspender ?
 Cautioner in a suspension how far liable ?
 Cannot be further liable than the suspender.
 To whom liable ?
 Attester.

Charge to enter Heir. Page 130.

General charge.
 Special charge.
 In what cases a special charge not necessary ?

Citation. 131.

In a process on the passive titles, who must be cited ?
 In a process against a minor, who must be cited ?
 In extrajudicial steps against minors, who must be certiorated ?
Actio directa tutela.
 In confirmations.
 Process against executors.
 Exoneration.
 Process against cautioners.
 Process against a woman *vestita viro*.
 Process upon delinquencies.
 Process at a legatar's instance.
 Process at an assignee's instance.
 Process of locality.
 Process for a pension.
 Declarator of extinction or payment.
 Declarator of bastardy.
 Declarator of property.
 Declarator of marches.
 Declarator of servitude.
 Declarator of redemption.
 Declarator of escheat.
 Declarator of nonentry.
 Declarator of recognition.
 Regress upon excambed lands.
 In simple reductions of voluntary rights.
 In reductions of judicial deeds.
 In reductions and improbations.
 Mails and duties and removing.
 Abstracted multures.
 Process of forthcoming.
 Adjudication.
 Reduction *ex capite inhibitionis*.
 Pounding of the ground.
 Process of sale.
 Exhibition.
 Incidents.
 Process of transumpt.
 Proving the tenor.

Clandestine marriage. 143.

Clause

of the T I T L E S.

Clause, &c. Page 144.

Communi pastura.
Moris, maresius.
Cum piscationibus.
Species of money.
Free rent.
Valid and sufficient infeftment.
Debts real and true.
Demonstrative or taxative.
Escheat of delinquents convict.
Clause importing a regality.
Betwixt and a term.
Naming a person in office.
Grant during pleasure.
Clauses in contracts of marriage.
Revocation of a tailzie.
Clause dubious.
Liberty to contract debt *pro expediendo licitas suas res.*
Clauses whether importing property or only servitude ?

Coalier. 148.

Collation. *Ibid.*

Has no place save in succession of moveables ;
Nor where the succession to moveables is in virtue of a destination ;
Nor with regard to any subject save moveables.
Nor where a separate provision is given excluding it.
Has no place in the division of moveables betwixt the children and relict.
Heir may claim a legitim upon collating the heretage.

College. 149.

What professors have privilege of voting ?
Delinquencies in professors how to be tried ?

College of Justice. 150.

Abstract of the declarator of the privileges of the college of justice.
Director of the chancery a member.
Exemption from answering to other courts save the session.
Privileges extended to the widows of members.
Privilege of a Lord of session not to answer in the outer-house.
Retiring to the Abbay, if it is a forfeiture of privileges ?
Members must answer to summar complaints.

Collusion. 152.

Commissioners of supply. 153.

Common Interest. 154.

Commonty. 155.

Communion elements. *Ibid.*

(c)

Commu-

A T A B L E

Community. Page 156.

How far a community is bound by the deeds of its magistrates ?
Magistrates cannot alienate gratuitously.
Magistrates bound as representing the town, if liberate by expiry of their office ?
University how far bound by the deeds of the masters ?
Powers of boxmaster.
In legal diligence against a community, who must be cited ?

Compensation, Retention. 158.

Of old not sustained in our practice.
Nature of Compensation.
Exception against payment or performance upon a liquid claim.
Exception upon a claim not liquid, but *ubi est parata executio*.
Illiquid claim not sustainable either as compensation or retention.
What understood to be a liquid claim ?
Quod statim liquidari potest, pro jam liquido habetur.
Who entitled to propound compensation and retention ?
Against whom competent ? Imo, If good against an onerous assignee ?
2do, If retention be good against an onerous assignee ?
3tio, If proponable against an heir, who has the benefit of discussion ?
4to, If against executors ?
5to, If against an executor-creditor ?
6to, If against an arrester ?
7mo, Retention if good against an arrester ?
8vo, Compensation if good against a donator of *escheat* ?
9no, Retention if good against a donator of *escheat* ?
Where the debt upon which compensation is proponed, is destined to certain purposes.
Compensation or retention if good against an *actio mandati* ?
If good against an *actio depositi* ?
Real and personal debts, if mutually compensable ?
Compensation or retention not proponable after decree,
Unless the charger be *vergens ad inopiam*.
Compensation upon a prescribed debt.
Ubi non est concursus ?
Effect of compensation,
May be paid from before decree.
If sustainable to save an irritancy from being incurred ?
Effect of retention.
Recompensation.

Competent. 169.

Decree cannot be taken away but by reduction.
Decree of arising.
Decree dative.
Service of an heir.
Decree of preference upon a multiple-pounding.
Decree arbitral.
Objections against a homing, if proponable by exception ?
Objections against a standing infeftment, how proponable ?
Objections against an inhibition.
Bankruptcy, how proponable ?
Objections against rights granted by ecclesiasticks.
In possessory actions replies against the defender's right reserved till reduction.
Exceptions against legal instruments.
Messengers execution.
Improbation how proponable ?
Vis & metus.
Exception against a bond granted by a woman *vestita viro*.
Irritancy how proponable ?
Deed by a minor without consent of his curators.
Minority and lesion.
Death-bed.
Challenge upon the head of inhibition.
Challenge upon the head of interdiction.
Exhaustion how proponable ?

of the TITLES.

Turpis causa.

Proof of tenor, if competent by way of defence ?

What exceptions competent against a proving of the tenor.

Exceptions if proponible *in cursu diligentia* ?

In a competition every alledgeance receivable by way of exception, without necessity of reduction.

Competition. Page 178.

Arresters with poinders.

Arresters with assignies.

Arrester with annualrenter insisting in a personal action.

Arresters with dispoonees.

Arresters with apprisers.

Arresters with executors-creditors.

Assignies with executors-creditors.

General assigney with creditors.

Assignies with comprisers.

Assignment to mails and duties with other rights.

Apprisings with voluntary rights.

Liferents with other debts.

Charters of resignation and confirmation.

Infeftment upon resignation with other rights.

Betwixt singular successors where the common author is not infeft.

Betwixt rights flowing from different authors.

Annualrenters, adjudgers, inhibitors, &c.

Concurfus Actionum. 185.

Where different actions arise upon the same fact, tending to the same end, the pursuer cannot insist upon both.

The same where the conclusions are contradictory ;

But where the conclusions are different he may insist upon both.

After a fine for contumacy, the judge cannot fine a second time for the delict.

Condictio Indebiti. 186.

Condition. 187.

Condition *si sine liberis*.

Condition of marrying with consent.

Condition, whether to be understood copulative or disjunctive ?

Condition of being decerned, includes a decerniture by decret-arbitral.

Condition *si sine liberis*, not purified while the marriage subsists.

Condition that a bond shall be void if not uplifted, is not purified if a demand be made.

Condition of succeeding as heir, not purified by the heir's obtaining a disposition.

Effect of a resolute condition.

Confirmation. 192.

No real right established by an infeftment *a me*, until it be confirmed.

Confirmation of an infeftment to be holden *a me & de me*.

Confirmation may be granted *quandocunque*.

Confirmation of the radical right, if it validates all the branches ?

What rights require confirmation ?

Competition among rights confirmed.

Confusio. 195.

Conquest. 196.

Clauses of conquest, how far extended ?

Provision of conquest, if burdened with debts contracted during the marriage ?

(c) 2

Subjects

A T A B L E

Subjects purchased partly before, partly after the marriage, how far reputed conquest ?
Sums conquest but applied for purging incumbrances.
Rights conquest, but taken in favours of younger children.
Lands conquest and sold again.
Liferent of the conquest over and above the liferent of a sum certain.

Consignation. Page 199.

Consolidation. 200.

Consuetude. 201.

Habite and repute a messenger.
Judge acting *extra territorium*.
Judge acting in *feriat* time.
Legal diligence execute at a wrong place.
Head-court held at a wrong place.
Wrong symbols of *safine*.
Safine not registrated.
Deed executed in a wrong form.
Process carried on in a wrong form.
Term of entry.
Informal execution.
Sentence-money.

Courtesy. 205.

Who has right to courtesy?
When it has place ?
In what subjects ?
To what burdens subjected ?
Courtesy may have place where the defunct heirs was not habily infeft.

Creditors of a Defunct. *Ibid.*

Decisions upon act 24th, parl. 1661.
Who understood apparent heirs in the sense of the act ?
Takes place in moveable as well as heretable succession.
What diligence necessary in order to give preference ?
The three years how computed ?
No bar against disposing to the defunct's creditor, even within the year.
Decisions upon act of federunt 1662.
Who entitled to the benefit of the act ?
What diligence necessary ?
Creditors how preferable doing diligence after the six months ?

D

Damage and Interest. 207.

Death. 209.

Morte mandantis cessat mandatum.
Unless the mandat be *in rem alienam*.
Procuratories and precepts.
If the debtor die *pendente processu* ?

of the T I T L E S.

If a master or tenant die after warning ?
If a debtor die *in cursu diligentie* ?
Judicial deeds after the judge's death or removal.
Order of redemption.

Death-bed. Page 211.

Competent to all sort of heirs.
If competent to heirs of provision ?
Competent to the remoter heir, after the immediate apparent heir's decease.
Competent also to the wife and children.
If competent to the defunct's creditors ?
Death-bed-deed effectual, and gives a *jus exigendi*, unless challenged by the heir.
Against what deeds it strikes ?
Where the disposition is *intra familiam*.
Bonds of provision to children.
Liferent in favours of a wife or husband.
Deeds in favours of creditors.
Sale of lands.
Tack granted on death-bed.
Death-bed-deed, if it will infer recognition against the heir ?
Nomination of tutors.
Reserved faculties, if exercisable upon death-bed ?
Blank filled up upon death-bed.
What circumstances infer death-bed ?
Reconvalescence by going to kirk or mercat.
Other circumstances to infer reconvalescence, equivalent to going to kirk or mercat.
Going to the cros of Edinburgh.
The particular disease need not be libelled.
Act 4th, parl. 1696.
Apparent heir's consent.
Granter's ratification upon oath.
Effect of this reduction.
One under sentence of death.

Debitor and Creditor. 221.

Relief among co-debitors, and if the creditor upon payment is bound to assign in order to operate relief ?
A preferable creditor can do no arbitrary deed to prefer one secondary creditor to another ;
Therefore if he take his payment out of one subject, he is bound to assign to the postponed creditor in order to operate relief.
The creditor's passing from his separate security, is a liberation to the cautioner.
Must assign every separate security he has for the debt.
For the cautioner can reap no benefit from the separate security, unless conveyed to him.
One entitled to relief getting an ease upon payment, can claim nothing but the transacted sum.

Declarator: 228.

Gift of ward, if it requires declarator ?
Gift of nonentry.
Gift of *ultimus bares* and of bastardy.
Gift of single and liferent escheat.
Gift of recognition.
Gift of forfeiture.
Redemption.
Failzie.
Divorce.
Extinction by intromission.

Declinator. 229.

Inimicitia capitales.
Partial counsel.
Curator in his minor's cause.

(d)

Curator

A T A B L E

Magistrates in the burghs concerns.
Arbiter in questions upon the decreet-arbital.
Degree of relation necessary to found a declinator.
In what causes may relations be declined ?
If sentence pronounced by a relation be intrinsically null ?

Deforcement. Page 231.

Penalty of deforcement.
Defences against the process of deforcement.

Delinquency. 232.

Paricide.
Perjury.
In what cases may a procurator fiscal pursue without concurrence of the private party ?
Scandal.
Stellionate.
Suicide.

Depositum. 234.

What understood a *depositum* ?
Goods deposited taken away by force.
Effect of an *actio depositi*.

Defuetude. 235.

Dies incæptus. *Ibid.*

Diligence. 236.

Diligence prestable by apprisers.
Not bound to do diligence.
If he enter to the natural possession ?
If to the possession of mails and duties ?
Excluding other creditors.
What is sufficient diligence ?
Interruption of possession.
Tenant deserting his possession.
Diligence prestable by assignies in security.
Not bound to do diligence.
Partial intromission.
Clauses inferring obligation to do diligence.
Diligence prestable by annualrenters.
Preferable annualrenter must no diligence.
Excluding others.
Diligence prestable by donatars.
Diligence prestable by liferenters.
Diligence prestable by executors.
Diligence prestable by tutors and curators.
Must do diligence.
Bound to pursue dubious claims.
Liable for annualrents unuplifted.
If a debtor becomes suddenly bankrupt ?
Cui incumbit probatio of bankruptcy ?
Continuing to intromet after expiry of his office.
What is sufficient diligence ?

Diligence

of the T I T L E S.

Diligence preftable by factors and mandatars.

In what cales liable to do diligence.

Factor appointed by the Lords.

Chamberlain of the crown.

What understood fufficient diligence ?

Diligence of trustees, properly fo called.

Diligence, nimious.

Discharge. Page 244.

Discharge to one *correns*, how far it operates in favours of others ?

Discharging the debtor, different from difcharging the debr.

Claufes importing a difcharge.

Disclamation. 245.

Diffuffion. *Ibid.*

And firft diffuffion of heirs.

Who have the benefit of diffuffion ?

No benefit of diffuffion betwixt heir and executor.

Heir renouncing has no intereft to plead this privilege.

If an heir-male can in any cafe be purfued without calling the heir of line ?

No neceffity of diffuffion unlefs there be a vifible eftate.

Where the heir-male is bound primarily,

Or bound to relieve the heir of line.

Real burden follows the heir who fucceeds to the lands burdened.

What understood fufficient diffuffion ?

If the heir muft be further diffufft who has renounced ?

Diffuffion of principal debtors.

Cautioner for an executor has the benefit of diffuffion.

Cautioner for a collector, factor, &c.

Cautioners who have not the benefit of diffuffion.

Cautioner in a fufpenfion.

What understood fufficient diffuffion ?

Donatio mortis caufa. 249.

Deed in contemplation of death, the granter being to travel.

Bond payable after death, in cafe the granter die without heirs of his body.

Provisio hominis in place of a legal provifion.

Condition of voidance expref, no place for voidance as *donatio mortis caufa*.

Bond granted for an onerous caufe.

Dovecoat. 251.

E

Ejection. *Ibid.*

Entry in *vacuum poffeffionem*.

What acts of violence will infer ejection.

Who have intereft to purfue ?

Againft whom the action lies ?

What title neceffary ?

A T A B L E

Escheat. Page 252.

May fall upon a null horning.
 Donatar liable for the debt in the horning.
 What falls under single, and what under liferent escheat?
 1mo, *Bonds.*
 2do, *Rights having tractum temporis.*
 3tio, *Where the rebel is in the natural possession.*
 4to, *What falls not under escheat single or liferent?*
 Effect of liferent escheat.
 To whom single escheat falls? 1mo, *To the burgh.*
 2do, *To the Lord of regality.*
 3tio, *Jus mariti.*
 Liferent escheat to whom it falls? 1mo, *Where infesment is not taken.*
 2do, *Liferent office.*
 3tio, *Liferent escheat of an apparent heir.*
 4to, *Terce.*
 Competition single escheat with arrestment.
 With assignation.
 With an executor-creditor.
 With an apprising.
 Competition liferent escheat with creditors. 1mo, *Lapse of year and day establishes the right.*
 2do, *With a base infesment.*
 3tio, *Year and day how computed, with regard to the liferent escheat of an apparent heir?*
 4to, *Presenting a signature within year and day, if sufficient to prefer the creditor.*
 Liferent escheat once devolved, will stand good against every posterior right.

Excambion. 258.

Execution. *Ibid.*

Warrant of execution.
 Warrant how obtained?
 Execution disconform to the warrant.
 If the messenger must shew his warrant?
 Where parties must be cited, and executions gone about?
 Execution against a party within the kingdom, must be personally, or at his dwelling-house.
 What understood to be a party's dwelling-house?
 Edictal citation.
 Party forth of the kingdom.
 Denunciation upon a horning, where to be executed?
 Relaxation.
 Denunciation of comprising.
 Inhibition at what mercat-crosses?
 Execution in the night time.
 The execution must specify the names and designations of the party's dwelling-house, &c.
 Designation of the parties.
 Of the dwelling-house.
 Execution if it must bear the date of the letters?
 Execution not particular as to the time the charge was given.
 Execution by leaving a copy.
 Must bear delivery of a copy.
 If it must bear that the copy was subscribed.
 In execution at a dwelling-house, how the copy must be left?
 A Copy left with one in name of another.
 In local executions, how the copy must be left?
 Copy disconform to the summons.
 Three blasts of the horn.
 Publick reading and oyses.
 Six knocks
 Stamp.
 Denunciation upon a horning.

Execution

of the T I T L E S.

Execution against a body corporate.
Inchoat diligence not carried on, if it falls by lapse of year and day ?
Execution of a charge to enter heir.
Form of arresting a ship.
Executions that require not the ordinary solemnities.
Executions bearing in general to be lawfully gone about.
Clauses implying or importing particular legal steps of execution.
Execution returned blank to the party.
Verbal citation.

Executor. Page. 272.

Who entitled to the office ?
Cannot be two confirmations of the same subject at the same time.
Form of confirmation.
Executor must make faith, find caution, &c.
Executor may renounce *rebus integris*.
Cannot gratuitously discharge, nor uplift in prejudice of his assigney.
The executor has the only title to intromet with the subjects confirmed.
Cannot safely pay till warranted by a lawful sentence.
Can he state a debt paid without sentence *pro rata* ?
May pay privileged debts without sentence.
Must pay *primo venienti*.
After interpellation by one creditor, cannot pay to another, even upon decreet, but ought to raise a multiple poinding.
What understood sufficient interpellation ?
The appretiation in the confirmed testament is but a presumptive rule, which may be corrected by a confirmation *ad male appretiatam* ; or by a proof at the instance of the creditors, &c. of higher values.
Bound to communicate eases.
Every creditor may take decreet, and the defence of exhaustion will be reserved *contra executionem*.
If an executor die before obtaining sentence, there is place for an executor *ad non executam*.
Diligence raised by the principal executor, will it accresce to the executor *ad non executam* ?
What if there be a co-executor ?
If the executor die after obtaining sentence ?
Yet by obtaining sentence he does not become proprietar, nor can the executry be attached for his debts.
Confirmation of an executor *qua* nearest of kin, is a complete title, and no place for a *non executam*, tho' he die before execution.
Act 1617 anent retention of the third.

Executor-creditor. 279.

Title of confirmation.
If an heretable bond can be the foundation of a confirmation ?
Tho' an executor-creditor die before sentence, no place for a *non executam*.

Executry. *Ibid.*

What debts affects the whole head, what the dead's part only ?

Exercitor. 280.

Exhibition. 281.

Who have interest to pursue exhibition ?
If one is bound *edere instrumenta contra se* ?
General conclusion of all writs.
Who liable to exhibite ?

(c)

Exceptions

A T A B L E

Exceptions reserved against delivery.
Spoliatus ante omnia restitendus.

Exhibition ad deliberandum. Page 283.

Competent to all sorts of heirs.
Competent after *annus deliberandi*.
If behaviour bars this privilege?
If renunciation bars it?
Has no interest to call for writs of lands, whereof the defunct was denuded.
Who liable to exhibit?
What writs may be called for?
No conclusion for delivery.
Nor for compt and reckoning.

Expences. 285.

Expences laid out in *re communi*.
Expences laid out in obtaining exoneration.
Expences of plea.

F

Factor. 287.

Factory when irrevocable?
When understood revoked?
Factors powers.
Act of federunt 1711.
Factor entitled to a salary.
Factor malverfing.
At what period chargeable with the price of victual sold?
Factor contracting *Factorio nomine*, is he personally liable?

Faculty. 289.

Faculties that are consistent in law.
Import of clauses containing reserved faculties.
Faculty when understood exercised so as to be effectual against the disponent.
Reserved faculty if it operates in favours of prior creditors?
Disposition to an heir with a power to alter, &c. makes him liable to the disponent's debts, as heir of provision.
Faculty when understood exercised so as to be good against singular successors?
Competition of creditors claiming under the faculty.
Reserved faculties *stricti juris*.

Fairs and Mercats. 293.

Gift of a fair obtained by obreption.
Stolen goods bought in publick mercat.
Breaking of arrestment in time of fair.

Falsa demonstratio. 294.

Ferry-boat. 295.

Feu,

of the T I T L E S.

Feu. Page. 295.

Feus before parl. 1606, secure against casualties of superiority.
Feus after 1606, with superiors consent, how far available?
Act 1606, how far extended?
Feu granted by the king's vassal upon act 58. parl. 1641.

Feu-duties. 296.

Feu-duty in victual, who bound to carry the same?
Feu-duty payable in bear, if barley can be exacted?
Personal action for payment of feu-duties.

Fiar. 297.

In questions betwixt the husband and wife, who understood fiar?

Right taken to man and wife and their heirs.

Where the right flows from the wife.

Wife's heirs last in the institution.

Wife's heirs first in the substitution.

Clause giving the wife power of disposal.

In questions betwixt the parents and children, who understood fiar?

Right taken conjunctly to parent and child.

Both father and children named fiars.

Children infest as substitutes.

Father express to be liferenter only.

In questions among children, who understood fiar?

Settlement importing a liferent only.

Fiars power of uplifting without consent of the liferenter.

Fiar absolute limited. 304.

Obligation to execute an entail.

Clauses prohibiting alteration of a destination.

Prohibition to uplift without consent.

Simple destination.

Mutual substitution among children, how far it implies limitations?

Clause of return. And imo, *In a bond, and the clause strictly onerous.*

2do, *In a bond, and the clause of a mixt nature.*

3tio, *Where it is merely gratuitous.*

4to, *Clause of return in the destination of a land-estate.*

Where one is limited by a clause of return, if he uplift, must he find caution to reemploy?

Tocher provided in a contract of marriage, how far has the husband power of disposal?

Fiars of the Year. 311.

Debitor accomping.

Tutors, factors, &c. accomping.

Wrongous intrormenter accomping.

Fidei Commifs. 312.

Fishers. *Ibid.*

Forfeiture. *Ibid.*

If it dishabilitates the rebel's children?

What carried by forfeiture?

With what burdens it is affected?

A T A B L E

Competition creditors with the donatar of forfeiture.
 Quinquennial possession.
 Forfeiture of a subvassal.
 A& 18. parl. 1690.
 Fugitation.

Foreign. Page 316.

Forms of the law of Scotland can only regulate writs executed betwixt parties within Scotland; and therefore foreign writs formal according to the law of the place, will found an action here, as being obligatory *jure gentium*.

Bond wanting witnesses.
 Depositions not subscribed by the witnesses.
 Extract of a bond.

The like with regard to any thing done or transacted in another country, which cannot be subjected to the law of Scotland, whether as to proof or effect, but will be judged of by the law of the place so far as founded in the *jus gentium*, not where merely statutory.

Payment sustained probable by witnesses.
 Cedent's oath sustained against onerous assigney.
 Intromission with a defunct's moveables abroad, will not infer vicious intromission.

What if betwixt Scotsmen, and to have execution in Scotland?

But as the laws of a foreign state have no coercive force *extra territorium*, diligence in Scotland upon foreign deeds will be regulated by the law of Scotland.

Foreign assignation must be intimated.
 English act of curatry.
 Process in Scotland upon a foreign deed.

Personal bond executed according to the forms of the place, must be effectual in Scotland, tho' it be to dispoise subjects in Scotland.

But effects locally in Scotland, must be under the direction of the Scots law, as well as persons in Scotland; and the conveyance of such effects must be in the Scots form, just as much as an obligation granted in Scotland to one in another country.

Heretable subject bequeathed in a testament.
 Testament made by a bastard.
 Nuncupative will.

Testament confirmed in England.
 Assignation to moveables not in the Scots form.

Prescription by the law of which country regulated?

Annualrent by what law regulated, whether of the creditors country or debtors?

Foreign decrees how far effectual in Scotland?

Actio rei judicata.
Exceptio rei judicata.

Foreigner. 324.

Foreigners if they can hold land in Scotland?
 Bound to find caution for expences *in initio litis*.
 If a tutor can be given to a pupil who is a foreigner?

Forrest. 325.

Forisfiliation. *Ibid.*

Forum

of the T I T L E S.

Forum competens. Page 326.

Forum competens ratione domicilii.

Forum delicti.

Forum competens ratione rei sitæ.

Arrestment *jurisdictionis fundandæ gratia.*

Arrestment of the debtor's person.

Border-law.

Burgh-law.

Arrestment of the debtor's effects.

Reconvention.

Arrestment laid on in the hands of a person not subject to the jurisdiction.

Forum competens with regard to executors, factors appointed by the Lords, &c.

Testament, within which district must it be confirmed?

Fraud. 331.

Fraudulent concealment.

False allegation.

Granting a bond, and taking a discharge thereof of the same date.

Underhand dealing.

Latent deed presumed fraudulent, in order to protect against creditors.

One purchasing goods, knowing himself to be insolvent.

Facility and lesion, without condescending upon acts of circumvention.

Disposition elicited by a curator upon majority.

Deed not read at subscribing.

Funeral-charges. 338.

G

General Assignment. 338.

What understood a general assignment?

General legacy.

General clauses in an assignment, what they import?

If a general assignment will carry subjects the grantor knew not of.

General Discharges and Renunciations. 340.

General clause in discharges, presumed to comprehend personal debts.

Nor heretable debts.

Nor a claim for relief.

Nor a right of reversion.

Nor a back-rack.

Nor a liferent provision.

Nor an action of improbation.

General discharge, if it is presumed to comprehend a debt *ab ante* assigned?

If presumed to comprehend a debt wherein the grantor is substitute only?

If presumed to comprehend legal provisions?

If presumed to comprehend an undelivered bond of provision?

General submission. 345.

(f)

General

A T A B L E

General Letters. Page 345.

Gift of Bastardy. 346.

Competition.
What it comprehends ?

Gift of Escheat. *Ibid.*

Formalities of the gift.
Gift of single escheat, how far extended ?
Gift of liferent-escheat, how far extended ?
Competition betwixt gifts of escheat.
Competition betwixt a gift of liferent-escheat and a discharge of the same.
Donatars backbond.
Barons of exchequer *functi* by the first gift.

Gift of Forfeiture. 348.

Gift of Nonentry. 349.

What it comprehends ?
Competition betwixt gifts of nonentry.

Gift of Ward. *Ibid.*

Gift of ward and marriage.
Of ward and nonentry.

Glebe. 350.

What ministers entitled to a glebe ?
Kirks being united the minister hath right to both glebes.
Presbyteries jurisdiction in designing glebes.
Form of designation.
Glebe out of what lands designable? And *imo, Kirk lands.*
2do, *Arable lands.*
3tio, *Bishops and abbots lands.*
4to, *Temple-lands.*
Once designed and possest, cannot be a second designation.
Fenel and pasturage.
Relief competent to the heretor whose land is taken for a glebe.

Grounds and Warrants. 353.

Executions and other warrants unnecessary after twenty years.
General and special charges.
Warning and precept.
Edict.
Procuratory for using an order of redemption.
Comprising.
To support a decret the defender bound only to produce the grounds and warrants that belong to himself.
Decreet of an inferior court.
A bond reduced, if it must be given up to the pursuer, or ly as a warrant ?

Heir

of the T I T L E S.

H

Heir and Executor. Page 356.

Heir pursuing for a moveable debt.
Heir's interest in the moveables.
Relief among heirs.
If the heir is liable for the relict's aliment till the term?

Heir apparent. 357.

Apparent heir entitled to continue his predecessor's possession, and to defend, tho' not to pursue.
Competition about the possession.
What right has he to the rents?
Apparent heir's privilege of selling his predecessor's estate at a publick roup.
Redemption of apprisings from apparent heirs.

Heir cum beneficio. 361.

The act 1695, if it retrospects?
This privilege competent to a second apparent heir, after death of the former.
Form of making up inventory.
May pay *primo venienti*.
Must pay or assign.
Creditors preferable according to their diligence.
If the subject is free to the heir, upon payment of the proved value?
If he must accompt for the profits he makes of the subject?
Must communicate cases.

Heir portioner. 363.

What falls to the eldest as a *præcipuum*?
Action *communis dividundo*.

Heirship moveables. 364.

What moveables are heirship?
Who entitled to have heirship? 1mo, *Heir of a prelate*.
2do, *Of a baron*.
3tio, *Of a burges*.
In what cases not claimable?

Heretable and Moveable. 366.

Fructus naturales & industriales.
Bygones are moveable. 1mo, *Blench-duties*.
2do, *Feu-duties*.
3tio, *Casualties of superiority*.
4to, *Annualrents of a bond containing a substitution of heirs*.
As to heretable and moveable, *tempus mortis inspicendum*.
Bond with a clause for annualrent before act 1661.
Rights having *tractum temporis*.
Share of an incorporate stock.
Obligation to lay out money upon heretable security.
Sums destinated to be laid out upon heretable security.
Assignment of a bond secluding executors.

A T A B L E

Creditor or debtor dying before the term of payment,
 1mo, *Of a bond heretable by a clause of annualrent.*
 2do, *By a clause of infeftment.*
 3tio, *By a clause secluding executors.*

Sum moveable notwithstanding of real security.

Price of an heretable subject.

Adjudication upon a moveable bond.

Accessory security.

Surrogatum.

Claim for relief.

Diligence upon heretable subjects.

If a decreet makes a sum moveable ?

If requisition ?

If a charge of horning ?

Bond secluding executors, if rendred moveable by diligence ?

Diligence upon a comprising.

Diligence against a cautioner.

The last step of diligence is the rule.

What if the diligence be null ?

Heretage and Conquest. 375.

Bond secluding executors.

Tack.

Right upon which infeftment has not past.

Herezeld. 376.

In what cases due ?

Receipt of a herezeld entitles the heir to continue in possession.

Homologation. 377.

Deeds directly inferring consent.

Inchoat act not perfected.

Silence, in what cases it infers consent ?

Consent cannot be presumed where the right is not known.

Facts inferring knowledge of, and consent to, the right quarrelled.

Legal steps, passing of course, infer not consent.

Acting in one capacity, if it infer consent, necessary to be given in another capacity ?

Consent not presumed, where the deed can be ascribed to another cause.

Taking benefit of a reducible right, while it stands, no homologation.

Homologation of a part, is homologation of the whole.

Accepting of a part incontroverted.

Protesting takes off the presumption of consent.

If homologation can be inferred from the deeds of an administrator ?

Effect of homologation. And 1mo, *If it will validate a null deed ?*

2do, *If it will validate a writ founded upon an error in fact ?*

Horning. 384.

Household plenishing. *Ibid.*

Husband and Wife. *Ibid.*

What subjects fall *sub communione bonorum & debitorum.*

Bygones fall *sub communione.*

Bond bearing annualrent falls not.

Nor a bond having a clause of infeftment.

Bill of exchange falls *sub communione.*

Claim of relief.

Bond



of the T I T L E S.

Bond assigned before marriage, tho' not intimated.

Right having *tractum futuri temporis*.

Bond containing substitutions.

If an illiquid or conditional claims falls *sub communione*?

Heretable debts due by the husband, burden not the goods in communion.

Nor heretable debts due by the wife.

Rents or profits of heretable subjects, falling due during the marriage, go into the communion.

The wife's heretable subjects rendered moveable during the marriage, if they fall *sub communione*?

Moveables accruing to the wife during marriage, if they fall *sub communione*?

Money lent or given by a wife, presumed to be the husband's.

Goods peculiar and personal to the wife that fall not *sub communione*.

Fus mariti, if it can be renounced?

Husband how far liable for his wife's debts, contracted before marriage?

Liable to all personal debts contracted before marriage.

And to the current annual rents of heretable debts during the marriage.

Liable to heretable debts contracted before marriage *in quantum lucratus*.

When understood *lucratus*?

Liberated from his wife's moveable debts by dissolution of the marriage.

Unless he be *lucratus* by the marriage.

And even then *subsidiarie* only.

Mutual duties betwixt husband and wife.

Husband bound to aliment and provide for his wife,

Unless he be insolvent.

The wife if maltreated may withdraw, and is entitled to a separate maintenance.

The husband if bound to provide his wife in a jointure?

Relict's aliment till the term after her husband's decease.

Mourning.

Expences upon the birth of a posthumous child.

Husband and wife's funeral expences.

Husband's powers with regard to management of the common stock.

Administration of the goods in communion.

Management of the children.

Husband curator to his minor wife.

A married woman's deeds, in what cases effectual against herself, the husband consenting or not consenting?

Furnishing to a wife. And 1^{mo}, *Where the husband is bound to aliment.*

2^{do}, *Where she has a separate aliment?*

3^{tio}, *Where the husband is bankrupt.*

Her personal bond for borrowed money not binding, tho' the husband consent.

Nor a bond of provision,

Unless payable after her death.

Personal bond granted in order to lead an adjudication.

Wife's personal bond for borrowed money not *ipso jure* null, 'tis a ground of action, tho' elidable by exception.

Bond for an antecedent onerous cause.

A wife is at liberty to bind herself in all obligations with regard to her own property, provided it be with the husband's consent.

She may also alienate her property with her husband's consent, whether gratuitously or onerously.

May exercise all acts of ordinary administration, with regard to her own property, without the husband's consent.

May bind herself without her husband's consent, *ubi agitur de lucro*.

Husband's consent how it must be interposed?

What if the husband be under a natural or legal incapacity?

A married woman's deeds, in what cases effectual against her husband?

Wife presumed to be *preposita negotiis domesticis*.

How far the *prepositura* presumed to extend?

Where the wife carries on traffick under her husband's eye.

Inhibition takes off the presumption of *prepositura*.

After proclamation of banns, the woman is considered to be in the same case as if actually married.

Barr'd from granting any gratuitous right after proclamation.

What proclamation sufficient?

What if there is no proclamation?

A wife cannot prejudice herself more than her husband after proclamation.

The wife how far *valens agere* without concurrence of her husband?

Cannot pursue without being authorised by her husband, or a curator *ad lites*, if he decline.

A T A B L E

If she can prosecute legal diligence without concurrence of her husband.
 If she may appear for her interest in a process without concurrence of her husband.
 May have action against her husband.
 But must have a curator *ad lites*.
 May prosecute legal diligence against her husband, without being authorised by a curator.
 If a woman can be cut out of her interest by lapse of time during the coverture?
 Husband bound to do diligence for recovering his wife's tocher.
 Unless where due by the wife herself.
The wife's personal privileges.
 In what cases liable to personal diligence?
Actio rerum amotarum.
Deeds betwixt husband and wife during marriage.
 Pure donations in what cases irrevocable?
 In deeds betwixt husband and wife, where there are clauses in favours of third parties, these not revocable however gratuitous.
 Postnuptial contract not reducible.
 Nor other mutual contract.
 Liferent provision to a wife *stante matrimonio*, if revocable?
 Provision granted to the husband *stante matrimonio*, in place of tocher, if revocable?
 Remuneratory donation.
 Donation after proclamation of banns.
 Revocation how barr'd.
 Power of revocation when it ceases.
 Form of revocation.
 Contract of separation *bona gratia*.
 When such a contract is revoked all things are restored in *statu quo*.
 Contract of separation upon a sufficient cause.
Marriage dissolving within the year all things are restored *hinc inde*.
 Holds whether in first or second marriage.
 Rights betwixt husband and wife.
 Rights flowing from third parties in contemplation of the marriage.
 Marriage presents.
 Expences laid out during marriage.
 What if a live child be born?
 Where marriage is dissolved through the fault of the parties.

Hypothec. Page 416.

Corns are hypothecated for the rent only of that year whereof they are the growth.
 And for that year's rent they remain for ever hypothecated.
 Hypothec upon the stocking subsists but three months after the year's rent falls due.
 Landlord's power of detention in virtue of his hypothec.
 Stocking taken off the ground may be brought back *via facti*, provided it be done *de recenti*.
 Landlord's process against intruders with subjects hypothecated.
 What if the intruder has left sufficiency to answer the year's rent?
 No hypothec upon cloth or manufactures.
 Tack of fishing.
 Tack of a burgh's customs.
 British statute anent the hypothec extends not to Scotland.
 Hypothec of *invecta & illata* in an urban tenement.
 Hypothec competent to writers and agents.
 Hypothec upon a ship for furnishing.
 Hypothec upon the cargo for the freight.
 Mariners hypothec for their wages.
 No hypothec upon goods for the price.

I.

Idiotry and Furiosity. 420.

Imbecillity. 421.

Lectus agriutudinis.
Luctus.

Aflus

of the T I T L E S.

Æstus amoris.

Levity.

Persons dumb and deaf.

Implied Affignation. Page 422.

The principal conveyed, accessories follow.

A disposition of lands implies a conveyance of mails and duties.

Conveyance of a subject to which the disponer has not right, if it implies a conveyance of all right in his person relative to the subject?

Infestment of annualrent granted by one not infest, what it carries?

Conveyance of superiority does it carry casualties already fallen?

Implied Condition: 423.

In a bond of provision payable at a certain age.

Payable at the granter's decease, or at a distant term certain.

Bond containing substitutions.

In assignations *omnium bonorum*.

The above implied conditions have no place in onerous deeds.

The end failing with a view to which the deed was granted, if this will loose the obligation?

A final settlement overturned in one particular, how far effectual as to the remainder?

Obligation granted upon supposition of a fund of payment, which the granter is afterwards deprived of.

Renunciation granted upon the same supposition.

Obligation granted upon an expectancy, how far the disappointment vitiates the same?

Alimentary provision, will it fall when the creditor comes to be otherwise provided?

Impulsive cause false.

Condition *si sine liberis*.

Implied Discharge and Renunciation. 430.

Acting as superior by receiving casualties of superiority, if it imply a discharge of any claim to the property.

Granting a precept of *clare*, if it imply a discharge of any casualty of superiority?

Granting a precept in obedience.

Superior purchasing in the subject alienated, whereby recognition is incurr'd.

Removing how past from?

Accepting a tack implies a renunciation of the property.

Accepting a new tack, how far it implies a renunciation of a former?

Conventional penalty excludes not the legal penalty.

Irritancy incurr'd, how past from?

Inhibition of teinds, how past from?

Requisition or premonition, how understood past from?

Decreet arbitral.

Legal exception.

Provision of conquest.

Conventional provision, how far it implies a discharge of the wife's legal provisions?

Confirmation of a base infestment, secures not from ward or other ordinary casualties.

If it secures from liferent-efcheat?

Secures from recognition tho' incurr'd.

If a base right confirmed can be brought *in computo* by the superior, to infer recognition against other alienations.

If it can be brought *in computo* by the vassal to save from recognition.

Publick infestment of the whole ward lands does not save from recognition, if the base infestments granted by the purchaser and his author extend above the half.

But a publick infestment of part of the lands is safe against recognition, if not already incurr'd.

A publick infestment cannot be brought *in computo* to infer recognition against base alienations.

Novo damus secures against all claims to the property, but not against casualties burdening the property.

Novo damus virtually a confirmation of all anterior base infestments.

Charter of resignation from the crown implies a confirmation of no base right or servitude, tho' mentioned in the charter.

A right of reversion in the superior's person, not hurt by confirmation.

A T A B L E

Nor does it bar him from reducing *ex capite inhibitionis*.
 Consent implies a *non repugnantia* as to all right at the time in the consenter's person.
 Consent by one who has legal objections.
 Consent to a disposition of warrandice.
 Consent to a disposition in a minute of a marriage-contract.
 Consenter and joint disponent.
 One whose trust is taken off his hand, cannot afterwards be challenged for want of diligence.
 Expences of plea cannot be claim'd after decret is extracted.

Implied Obligation. Page 440.

Implied Power. 441.

Implied Will. *Ibid.*

Improbation. 442.

This action to whom competent?
 Conclusion calling for all writs in general.
 Certification cannot be granted, unless improbation be libelled.
 As likewise certification of falshood for not production.
 The stile of a certification in an improbation.
 Who must satisfy the production?
 What terms allowed for production?
 Defender must produce reserving his defences.
 In what cases extracts sustained to satisfy production?
 A condescence that the writs called for are in a private hand, not sufficient.
 Transumps, if sufficient to stop certification?
 No certification *contra non producta*, where the defender produces, and offers to exclude.
 Certification refused, where the pursuer, his predecessors or authors have acknowledged the writs called for.
 If the defender may produce to stop certification in the improbation, allowing the reduction to go in absence.
 Improbation not sustained against titles of honour.
 Certification has no effect, further than to support the pursuer's interest.
 Grounds for reponing against a decret of certification.
 Summar incarceration upon suspicion of forgery.
 Abiding by.
 Pursuer must consign L. 40.
 After succumbing in the direct manner of improbation, if the indirect is competent?

Indefinite intromission. 458.

Applicable in *duriores sortem*.
 Preferable right.
Ubi est parata executio.
Jus nobilius.
 Applicable in *sortem ejusdem generis*.

Indefinite Payment. 460.

Electio est debitoris.
Antiquius debitum.
 Sum not bearing annual rent.
 Sum wherein the person making payment is principal debtor.

Indemnity. 461.

Indevisible.

of the T I T L E S.

Indivisible. Page 462.

Decreet-arbitral *ultra vires*.

Decreet-arbitral where points are referred to the determination of others.

Writ of importance subscribed but by one notary.

Testament where the executor is a subscribing witness.

Verbal legacy above L. 100.

Retour.

Deed partly *ultra vires*.

Induciæ Legales. 465.

Privileged summons.

If a summons upon the passive titles can be raised and executed during the running of the days of the charge to enter heir?

Citation of tutors and curators.

Induciæ before inferior courts.

Induciæ in a charge of horning.

In baron decreets.

In a decreet-arbitral.

Induciæ in criminal sentences.

In reductions and improbations.

In citations *pro confesso*.

Days how computed.

Annus deliberandi.

To whom competent?

From what time it runs?

What diligence may be done, *intra annum*?

What actions may be pursued *intra annum*?

Process, in what cases it must stop, the defender dying *pendente lite*?

This privilege how lost?

Infestment. 469.

Safine an essential solemnity.

In what cases safine not necessary?

Renunciation not *habilis modus transferendi domini*.

Effect of resignation.

Infestment of burgage-lands.

Base infestment in burgage-holding.

Method of obtaining infestment by an heir.

Method of obtaining infestment by an appriiser.

By a singular successor after resignation is accepted of.

Inhibition. 472.

Stile of inhibition.

If the debt must be condescended on in the inhibition?

Inhibitions pass *causa cognita*.

Inhibition but a personal prohibition.

What subjects are affected by this diligence?

Reaches *adquirenda*.

Has effect only against voluntary deeds, and what are understood voluntary deeds.

If it strikes against renunciations?

If good against recognition?

If good against a conditional alienation?

If it not only protects the debt, but all diligence following thereupon?

But inhibition has effect only from the decreet of reduction.

Operates not in favours of third parties.

Effect of the reduction how restricted by the pursuer's want of interest?

Innovation. 477.

(h)

Interdiction.

A T A B L E

Interdiction. Page 478.

Virtual interdiction.
 Solemnities in publication.
 What effect it has before publication ?
 What effect after publication ?
 Has no effect as to moveables or personal execution.
 Strikes not against onerous or rational deeds.
 Interdictor's consent, if it must be formally adhibited.
 Interdictor *author in rem suam fieri nequit*.
 Voluntary interdiction falls by the death of the interdictors.
 Reducible where destitute of a rational foundation.
 Reduction upon this head to whom competent ?

Intimation. 482.

Intrusion. *Ibid.*

Irritancy. 483.

Legal irritancy, *ob non solum canonem*.
 Conventional irritancy *ob non solum canonem*.
 What if the superior be not infest ?
 What if part be paid ?
 Effect of a clause, *Si petatur tantum*.
 Legal irritancy upon assigning or subsetting a rental-right.
 Is marriage such an assignation as to infer the irritancy ?
 If negligence in preserving the subject infers an irritancy ?
 Irritancy is not a voidance of the right, making it voidable only.
 Irritancy *ob non solum canonem*, how far effectual against third parties ?
 If irritancy takes place where the condition becomes imprestable ?
 Irritancy when purgeable ? And 1mo, *Pactum legis commissoria pignoris*.
 2do, *Irritancy ob non solum canonem*.
 3tio, *Other irritancies in feus, tacks and rentals*.
 4to, *Conventional irritancies in bargains and contracts*.
 Offer of payment if it stops incurring the irritancy ?

Jurisdiction. 491.

Judge, what authority he has *extra territorium* ?
 Parts of a barony in different shires.
 Jurisdiction how dismembered ?
 Effect of a deputation.
 What cases must be tried by an inquest ?
 Prorogation of jurisdiction.
 Decreet pronounced by an incompetent court.
 Decreet pronounced in vacation time, how prorogated ?
 Prorogatio de loco in locum.
 De causa in causam.
 Prorogation of a commissary decret above L. 40.
 Prorogation of the jurisdiction of a judge, against whom there lies a personal objection.
 Prorogation of the jurisdiction of the court of session, in causes where they are not judges at the first instance.
 Proposing other defences after a declinator is repelled, no prorogation.
 Prevention in cumulative jurisdictions.
 Jurisdiction of the court of Session.
 To what causes the jurisdiction extends ?
 Causes in which they cannot judge at the first instance.
 Actions peculiar to this court.
 Power of advocating causes to themselves.
 Power of advocating from one court to another, where they have no jurisdiction in the cause.
 If they may suspend the decreets of sovereign courts ?

Criminal

of the T I T L E S.

Criminal jurisdiction.

Nobile officium. 1mo, *Proof ex officio.*

2do, *Supposing omissions in deeds.*

3tio, *Interposing authority to the deeds of private parties.*

Power of naming factors.

Modification of prisoners aliment.

Modification of the fiars.

Inferior Court.

Jurisdiction. 1mo, *With regard to improbations.*

2do, *Ejection.*

3tio, *Contravention.*

4to, *Process of transference.*

5to, *To what extent can they fine?*

6to, *Cannot review their own decreets.*

Vacation dispensation.

Execution of Sentences.

Admiral court.

Jurisdiction.

Baron court.

Jurisdiction *in civilibus.*

In criminalibus.

Jurisdiction belonging to proprietars who are not King's vassals.

Jurisdiction of these who are infest *cum curiis.*

Commissary court.

Superior and inferior commissaries, and their privileges.

Jurisdiction.

Limited that they cannot judge in causes above a certain sum.

Assessors.

Where the courts must be held.

If commissaries must reside where their courts are held?

Dean of Guild court.

Court of Exchequer.

Jurisdiction.

An action lies at common law for redress, where the barons of exchequer are guilty of partiality in completing gifts proceeding from the crown.

Justices of Peace.

Jurisdiction.

Power of fining for contumacy.

Quorum.

Defender must be allowed a procurator, and time to prepare defences.

Summary execution.

Lyon Court.

Jurisdiction.

Where the court must be held.

Charity box.

Regality Court.

A Lord of regality may pursue before his own bailie.

Heretable bailie.

Sheriff Court.

Jurisdiction.

Enactment before the sheriff to appear before the court of justiciary.

What court competent for registration in order to diligence?

Jus quæsitum tertio. Page 511.

Stipulation in favours of a third party.

Delivery for behoof of a third party.

Order to pay money to a third party.

Backbond when understood to be designed in favours of third parties?

What action competent to the third party?

Among third parties having an interest, who is preferable?

Voidance of the principal right, will it void the third party's interest?

Jus superveniens auctori accrescit successori. 513.

Where the author is liable in warrandice?

(h) 2

Where

A T A B L E

Where the author is not liable in warrandice.
To which successor does the right accresce?

Jus tertii. Page 515.

Pursuer must qualify a legal interest, otherwise no process.
Competent to the defender to found upon a third party's interest or other argument, to shew there is no ground of claim.
But not competent to object against my party's title, unless I can qualify a legal interest.
And what is understood to be a legal interest?
Objections, privileges, &c. competent to some and not to others.

K.

King. 523.

Grant from the crown must pass the seals.
Annexed property.
Power of granting jurisdictions.
Power of revocation.
Not to be prejudged by neglect of his officers.
King's privilege as creditor.

King's Advocate. 525.

When a special warrant is requisite?
What crimes may be pursued without concurrence of the private party?
To what actions is the concurrence of the king's advocate requisite?
If obliged to give his informer?

King's Palace. 526.

Kirk. *Ibid.*

Who must uphold the kirk?
Bell.
Disposal of the area.

Kirk Patrimony. 527.

Religious houses cannot be feued or set in tack.
Dean cannot grant a tack without consent of the chapter.
Chapter's consent how to be interposed?
Stipendiary cannot set a tack to continue after his death.
Tack cannot be set during the currency of a former.
Tack ineffectual, if it has not attained possession before the granter's death;
Or if set, to take place after death.
Tack cannot be set with diminution of the rental.
For how long space may tacks be set?
Tacks set during the granter's incumbency.
Feus granted by churchmen.
If they can change simple ward into tack-ward?
Erection of kirk-lands into temporal lordships.
Superiority of kirk-lands annexed to the crown.
Personal services taken away from superiors of kirk-lands.
Suit in preference at the head-court.

Kirk-Yard, 532,

Lætio

of the T I T L E S.

L.

Læſio ultra Duplum. Page 532.

Lawburrows. *Ibid.*

Raiſer of Laburrows muſt make faith, that he dreads bodily harm.
Caution in lawburrows.
Penalty.
Againſt whom may Lawburrows be taken out ?
Acts of contravention.
Action of contravention how underſtood paſt from ?

Legacy. 535.

What underſtood a legacy ?
Legacy payable out of the free gear only.
Competition among legacies. And, 1mo, *A legacy ad pias cauſas.*
2do, *Special legacy.*
3tio, *Additional jointure left as a legacy.*
Legacy tranſmits without confirmation.

Legal Diligence. 536.

An heretable bond when it becomes perſonal, ſo as to be the foundation of diligence.
Purification of a conditional debt ſo as to be the foundation of diligence ?
Diligence in what caſes it can be raiſed, without intervention of a decreet of regiſtration ?
Proceſs againſt a cautioner before the principal be diſcuſt.
Proceſs before the term of payment.
Horning before incurring the failzie.
Arreſtment upon a debt *in diem.*
Adjudication upon a debt *in diem.*
Inhibition upon a debt *in diem.*
Arreſtment upon a dependence.
Inhibition upon a dependence.
Inhibition upon an obligation to compt and reckon.
Inhibition upon a conditional debt.
Inhibition upon a negative obligation.

Legitim. 543.

Is only of the father's means.
Who entitled to a legitim ?
Children have right to the legitim *proprio jure* without confirmation.
Forſfamiliation.
Renunciation of the legitim, what effect it has ?
If the wife renounce her intereſt.
Legitim how far ſubject to the father's power of diſpoſal.

Letter of Credit. 546.

Letters of open Doors. 547.

Letters of Supplement. *Ibid.*

Liferenter. 548.

Liferent-right of lands, what is comprehended therein ? And, 1mo, *If it carries a right to cut woods*

(i)

2do,

A T A B L E

2do, *Coal*.
 3tio, *Power to hold courts*.
 Liferent by reservation.
 Power of uplifting liferented fums.
Cautio usufructuaria.
Cui incumbit probatio, of the sufficiency or insufficiency of the houses?

Lis alibi pendens. Page 550.

Lis pendens in a separate jurisdiction.

Litigious. 551.

Litigious by process.

What understood to make a *lis pendens*.
 Affignation granted *pendente lite*.
 Marriage *pendente lite*.
 Encroachments *pendente lite*.
 Executions, &c. if they can be mended after being produced in process?
 Executions of legal diligence after registration.
 Titles made up *pendente lite*.

Litigious by arrestment.

Common debtor cannot discharge after arrestment.
 Bars not purchasing in publick mercat.
 Bars the competitor from affigning.
 Arrestee can do no deed to disappoint the effect of the arrestment.
Mora.

Litigious by denunciation upon a horning.

Debt contracted after denunciation.
 Alienation after denunciation.
 Bars not completing rights where there is an antecedent obligation.
 If it bars payment and other deeds of ordinary administration?
 Tack granted after denunciation.
 Act 147, parliament 1592.

Litigious by denunciation upon apprising, and citation upon adjudication.

Alienation after denunciation.
 Tack granted after denunciation.
 Right granted in consequence of an antecedent obligation.
Mora.

Litigious by inchoat inhibition.

Alienation after inchoat inhibition.

Litigious by using an order of redemption.

Litigious by infeftment.

Locus poenitentiae. 560.

Where writ is requisite.
Locus poenitentiae until the writ be perfected.
 What writing sufficient to bar *poenitentia*?
Ubi res non est integra.
Rei interventus.
 Oath.
Pacta liberatoria.
 Where writ is not necessary.
 Where the bargain is agreed to be perfected in writing.
Locus poenitentiae after writ is interposed.

M.

Manse. 565.

Designation of the manse.
 Forms of designing manses.

Who

of the T I T L E S.

Who liable to build and repair.
Minister's claim for house-rent.

Marriage, Avail of. Page 567.

Form of requisition.
Double avail at what time due?
Single avail at what time due?
If due where the superior consents to the marriage?
Consent how inferred?
Refusal if purgeable?
Parage and disparage.
Suitable jointure.
To which superior does the casualty accrue?
Modification of the casualty.
Fraudulent marriage in order to disappoint the casualty.
Personal action for payment.

Meditatio fugæ. 571.

Warrant for summar incarceration, who may grant the same?
If such warrants are granted by the court of session?
Goods ready to be transported out of the kingdom.
Witness *sub meditatione*.
Summar warrant to apprehend a bankrupt who is fled.

Member of Parliament. 572.

Privileges.
Fees to commissioners of parliament who liable?

Messenger. 573.

Mill. 574.

A mill does not pass as part and pertinent.
Unless in a disposition of a barony.
Proprietar of thirled lands cannot build a mill within the thirle.
Nor set up a hand-mill.

Minor. 575.

Pupil not liable to penalties,
Nor to imprisonment;
But decret may pass against him.
Cannot be decerned as a haver of writs.
Minor's oath.
Not bound to depone upon the verity of his debt.
If a minor can be a messenger?
If a tutor?
If an arbiter?
If a commissioner of supply?
What a minor can do without consent of curators?
What a minor cannot do even with consent of curators?
Minor wanting curators.
Deeds in minority when *ipso jure* null, when requiring a *restitutio in integrum*?
Process at a minor's instance to sell his land for payment of debt.
Lesion how it must be qualified to found a *restitutio in integrum*. And, Imo, *Lesion in extrajudicial proceedings*.
2do, *Lesion in taking legal steps*.
3tio, *Lesion in judicial proceedings*.
No restitution till the other party be also restored.
A minor dealing in traffick or other business, if he can be restored?
(i) 2

Minor

A T A B L E of the Titles.

Minor affirming himself to be major.

Quadriennium utile.

Recourse against curators bars not reduction.

If this reduction takes effect *ab initio*, or only from decreet?

Minority interrupts expiry of the legal.

Privilegiatus contra privilegiatum.

Minor non tenetur, &c. Page 587.

In what cases the privilege competent?

If competent to a minor, whose interest is only consequential?

If to a major, whose interest is connected with that of the minor?

Defends not against production.

Nor against a proving of the tenor.

No privilege where the process is founded upon the predecessor's deed.

Bars not actions the minor is liable to, from the nature of his right.

No privilege where action was commenced against the defunct.

Where the minor is the first provoker.

Privilegiatus contra privilegiatum.

A forfeited person restored *per modum justitie*, pursuing for recovery of his estate.

Mortification. 591.

Moveables. 593.

Symbolical delivery.

Traditio brevis manus.

Delivery to the mandatar in the mandant's name.

Rei vindicatio.

Consensual hypothec upon moveables not effectual.

Multiple-poiding. 593.

Mutual Contract. 594.

Retention until the other party also perform.

What if performable at different periods?

Irritancy not implied by failing to perform at the day.

One party proving unable to perform, the other has an action to be declared free.

If this holds in contracts matrimonial?

If the one party repudiate, is the other free?

If the one party has implemented, what remedy has he against the other unable to perform?

Contract when understood mutual, when conditional?

Prestations in mutual contracts good against Assignies.

One in possession by a voluntary deed cannot invert his possession in prejudice of the grantor.

The same holds with regard to legal disponees.

Possession must be restored at the termination of the right.

Incumbrances affecting the subject transacted by the disponent, cannot be extended against the disponent, bound in warrandice, further than to pay the transacted sum.



ACCESSORIUM sequitur PRINCIPALE.



WARD being taxt at a small sum in favours of a man and his heirs, the privilege was extended to a conjunct fiar, tho' there was no mention of her in the infestment granted to her husband. Sinclair, 2d March 1541, Gourlay *contra* Spence.

IN a process of abstracted multures, the Lords sustained the pursuer's title, altho' he did not connect his right with that of the party who first acquired the thirlage, and found, That his infestment of the mill carried the antient thirlage along with it as a consequence. Fountainhall, 25th November 1702, Bothwell of Glencorse *contra* Sir John Clark of Pennycuik.-----The Lords sustain'd an antient charter of lands, *cum molendinis & molituris*, to infer immunity from thirlage in favours of a succeeding heritor of these lands, altho' he derived no right from the obtainer of the charter, because lands once become free, are not brought under servitude again, but by the positive deed of the proprietor for the time. Forbes and Fountainhall, 11th July 1706, Dundas *contra* Sinclair.

SWINTON, during the usurpation, obtain'd a gift of the Earl of Lauderdale's estate, and, by virtue of that right, obtain'd a decret of certification against a decret of valuation. This certification was found to accresce to the Earl of Lauderdale when he was restored; for seeing Swinton did use the Earl of Lauderdale's right, all advantages which were not personal, but consequent upon the real right, behoved to follow the right itself, and accresce to the true proprietor, as if a servitude had been acquir'd, or a vassal's right reduced *ob non solutum canonem*. Stair, 13th July 1664, Earl of Lauderdale *contra* Wolmet.---The like, 28th February 1666, Earl of Lauderdale *contra* Viscount of Oxenford. Found, That a person forfeited and restored *per modum justitiæ*, might use any benefit the donatar had obtain'd during the forfeiture, such as decret of preference, &c. just as the improvements made by a tutor do accresce to the minor, *qui meliorem potest facere conditionem pupilli, sed non deteriozem*. Fountainhall, 24th January 1696, Earl of Cassils *contra* Montgomery of Lainshaw.

IN improbations pursued by liferenters, the certification must be restricted to the pursuer's interest, *i. e.* altho' the writs called for be de-

Accessorium sequitur Principale.

cerned to make no faith, it is only meant, in so far as may prejudice the liferenter, but will not be at all beneficial to the heritor. Durie, Spotiswood, (*Improbation*) 13th February 1627, Lady Borthwick *contra* Hay. — A Bond being granted to a man and his wife in conjunct fee, and the children to be procreate betwixt them, an adjudication led thereon at the instance of the wife and her second husband for his interest, without mentioning her children of the first marriage, was found effectual, she as conjunct fiae having the *jus exigendi*, and the adjudication was found to accresce to these children. Falconer, 15th February 1684, Lord Pitligo *contra* Hilstoun and her husband. Fountainhall observes it, 18th January 1684.

ONE infeft in lands, with the privilege of brewing within certain bounds, found to have right to plead upon decreets obtained by his author's confirming the said privileges, tho' these decreets were not assign'd to him, such privileges being real and following the ground. Durie, 25th July 1626, Stuart *contra* brewers in Glasgow.

A MINOR having assign'd a bond without an onerous cause, the assigney thereupon did diligence by apprising against the debtor. The assignation being quarrelled upon minority and lesion, the assigney contended, That he was only bound to put the minor in his own place, by retrocessing him to his assignation. The Lords ordained him to convey his apprising, which being led upon the minor's debt, must follow the same, and accresce to the minor. Stair, 19th July 1672, Ruthven *contra* Gray. — The Lords found, That an inhibition used by an assigney did accrue to a posterior assigney after reduction of the first assignation, it not being reduced *ex capite fraudis*. Forbes, 23d July 1713, Duncan *contra* Millar. — A creditor in a bond bearing annualrent, falling into civil rebellion, did long after year and day, and after his liferent-escheat was gifted, lead an adjudication upon his bond; in a competition betwixt an assigney to the adjudication, and the donatar, found, That the donatar having right to the annualrents of the bond, the adjudication, in so far as led for security of these annualrents, must accresce to him. Forbes, 10th January 1712, White *contra* Reid.

OLD Langtoun having given a publick infeftment to his son for relief of cautionry, not for the payment of creditors, without any enumeration of creditors, found, That creditors have not the privilege of that infeftment; so that young Langtoun might prefer some, and renounce the whole again to his father, or his creditors might prevent others by diligence. Harcus (*Infeftment*) 8th July 1691, creditors of Langtoun competing.

IN a bond of provision the granter was obliged to infeft the creditor, and the heirs of her body; which failing, other persons therein named, &c. in an annualrent effeiring to the principal sum of 20,000 merks, and to pay the annualrent yearly to the creditor, and her heirs of tailzie aforesaid; and the bond farther contain'd a clause, That the said sum of 20,000 merks should not be exigible till after the creditor's marriage. She dying unmarried, whereby the principal sum could never be sought, it was argued, That the yearly annualrent must also
cease

cease from her death, *quia sublato principali tollitur accessorium*. The annualrent was found to subsist until redemption by the debtor, being constitute pure and as a principal right, and it was not repugnant that the creditor in a certain case, *viz.* upon his marriage, should have an option either to continue in the said annualrent-right, or to take herself to a principal sum, quitting the annualrent-right. Stair, 24th June 1669, Stewart *contra* Stewart.

DILIGENCE raised by the principal executor, will accresce to the executor ad non executa. See executor.

ADJUDICATION and APPRISING.

Adjudication *contra hereditatem jacentem*.

A CREDITOR was allowed adjudication *cognitionis causa* upon an apparent heir's renunciation, albeit another creditor compear'd and offered to prove that the apparent heir had before behaved as heir, which was found no sufficient objection against the pursuer's adjudication. Durie, 20th December 1626. — *contra* Scot. — An adjudication upon a decret *cognitionis causa*, is effectual, tho' the heir happen'd to be served, and could not validly renounce, upon being charged to enter heir. — December 1731, Drummond of Gairdrum *contra* Alexander Jackson.

'Tis no objection to an adjudication *cognitionis causa*, deduced before the sheriff, that there was no abbreviate thereof signed by the judge, nor recorded in terms of the articles of regulation 1695, because these articles concern the session only. — December 1731, Drummond of Gairdrum *contra* Alexander Jackson. — The like, Fountain-hall, 29th December 1696, Murray *contra* Lord Saline. Fountain-hall, 24th December, Forbes, 23d December 1709, creditors of Marshal *contra* Lord Pancaitland.

A COMPRISING against a minor, as served heir to his predecessor, was found still to subsist, and to be of the nature of an adjudication *cognitionis causa*, when the minor, *ex capite minorennitatis*, is reponed, and renounces. Falconer, 27th February 1684, Dunlop *contra* Brown.

AN adjudication upon a renunciation to be heir, carries all bygones arising after the common debtor's death, tho' such bygones be moveable; and this *ex necessitate juris*, there being no other method for affecting such a subject. Durie, 19th December 1638, Corser *contra* Durie.

AN adjudication being led *contra hereditatem jacentem*, upon a renunciation to be heir, the heir afterwards entering, was not found to have right to redeem the adjudication, the renunciation being a virtu-

Adjudication and Apprising.

al approbation of the pursuer's diligence. Stair, 27th January 1680, M'Aulay *contra* Coustoun.

Adjudication in Implement.

THE assigney to an heritable bond having charged the cedent's heir to enter, and to grant procuratory, so as he the assigney might be infest; and having thereupon obtained decret against the said apparent heir as lawfully charged, and having charged him with horning, and denounced, and now insisting for adjudication of the heritable bond: The Lords sustain'd the adjudication, tho' the libel was not alternative, *viz.* either to fulfil the assignation, or pay a liquid sum, and sustain'd it without any renunciation, as being consonant to daily practice, the party being sufficiently discussed. Newbyth, 8th February 1666, Cruikshanks *contra* Lord Frazer.

A DEBITOR being obliged to infest his creditor in an yearly annualrent, an adjudication in implement thereof was sustain'd, tho' led not only for the bygones, but for the annualrent in time coming; the nature of this adjudication being in security, as well as payment, whereby it is a regular diligence, tho' done before the term of payment. Stair, 24th February 1675, Hamilton *contra* Cheesley.

Adjudication in Security.

THE Lords sustain'd an adjudication of a party's lands, upon an obligation, in his contract of marriage, to employ a certain sum to his wife in liferent, and to the children of the marriage in fee, raised *stante matrimonio* by friends, at whose instance execution was provided in the contract to pass, and this without necessity of any previous personal diligence against the husband for implement. Forbes, 27th January 1714, Anderson *contra* Gilhagie and Wallace.---The like, Falconer and Fountainhall, 2d January 1684, Bruce *contra* Hepburn.

Apprising.

WHEN the matter is of consequence, the Lords will appoint advocates to be assessors to the messenger who is judge to the comprising. Haddington,---1610, Lord Salton *contra* L. of Clunie.

APPRISINGS ought to be at the head-burgh of the shire where the lands lie, or, *in communi patria*, at Edinburgh. And dispensations to hold courts of apprising in any other place, ought not to pass of course, but upon special reasons to be consider'd by the Lords, or the Ordinary upon the bills. Stair, 12th July 1671, heirs of Lundie *contra* Earl of Southesk. And so a warrant upon a bill to lead a comprising at another head-burgh than that of the shire where the lands lay, was found null, since it was not at Edinburgh, which is *communis patria*. Gosford 21st July, 1670, Lady Lucia Hamilton *contra* creditors of Monkcastle.

UPON

UPON any urgent occasion the messenger, who is judge in the apprising, may continue the court of apprising till another diet. Stair, 12th July 1671, heirs of Lundie *contra* Earl of Southesk.

A SEARCH upon the ground of the land for moveables, ought to precede the charge and denunciation, and every other step of the comprising. Durie, penult July 1623, Nicolson *contra* Baillie.—A comprising was sustain'd, tho' no search was made for moveables at the dwelling-house, but only upon the ground of the comprised lands. Spotiswood (*Comprising*) July 1624, Moncrief *contra* Tenants of Lawes.—The like, where the dwelling-house was at a distance from the land. Durie, 13th December 1623, Lord Ley *contra* Stewart.—Where a superiority is comprised, there is no necessity of a previous search for moveables, it not being probable that the superior will have moveables on another man's property. Durie, 29th January 1624, Hop-pringle *contra* Ker.

A COMPRISING being expired, and a posterior creditor for keeping it open, having alledged, upon the old custom of giving a previous charge of horning before comprising, which was not done in the present case, at the same time offering to pay the appriser his whole principal sum, and even the accumulations, with the interest thereof since debursing, and all other expences; yet the Lords repelled the nullity of wanting a charge, seeing it had been in disuse past memory: And as to the advantage taken of carrying away the estate by an apprising for a small sum, the Lords found, That the remedy was not in their power; and tho' they had indeed, in such odious cases, frequently modified exorbitant penalties, to hinder estates from being swallowed up by such apprisings, yet that they had no power to prorogue legals, and keep them open. Fountainhall, 22d February 1704, Livingston *contra* Gudlet.

A COMPRISING found null, subscribed only by the clerk, and not by the messenger who was judge. Newbyth, 2d December 1665, M'Culloch *contra* Craig.—And a messenger dying, after deducing comprising, but before he subscribed the same, the Lords refused to allow another messenger, who only had executed the letters, but had not sat as judge, to subscribe it. Dirleton, 3d February 1675, Oliphant *contra* .

Adjudication upon act 1672.

AN adjudication being led, which did not repete both the alternatives in the act of parliament 1672, but only narrated the ground of the debt, and adjudged the debtor's whole lands, omitting the first clause about production of a progress, &c. The Lords, in a competition with another creditor, refused to find the adjudication null, yet, because of the defect, they cut off its penalties, termly failzies, and other accumulations, and sustained it only for a security, in so far as extended to principal sum and annualrents. Forbes, 17th, Fountainhall, 18th November 1708, Veitch *contra* Lady Mary Maxwell.

THE Lords found this reason of reduction of an adjudication relevant to restrict to the principal sum and annualrents, composition, &c.

B

without

without accumulations, &c. viz. That the adjudication being in absence, and of the debtor's whole lands, the decreet bore a fifth part more, and this because, tho' it behoved the creditor to libel the same in his summons, being uncertain whether the debtor would compear or not, yet that he ought not to have extracted a decreet for the same, when the party did not compear. Falconer, Home, 9th December 1681, Geddie *contra* Telfer.—The like, Home December 1683, Falconer, 16th February 1684, Wilfon *contra* Home: Upon occasion of which the act of Sederunt was made.—In an adjudication of an annualrent, the Lords sustained the adjudication as to a fifth part more; and found, That the reason of the act of parliament extended to annualrents as well as lands, tho' the act mentions only lands. Here it was alledged, That the reason of the act being, that the creditor was forced to take land for his money, it ceased in this case, where the debtor was personally bound in payment of the money, upon which the lands were redeemable, and therefore the creditor-adjudger might raise his money. Falconer, 10th January, Home, March 1683, Ker *contra* Ruthven.

A DEBTOR, in terms of the act of parliament 1672, having offered lands to the value of the sum libelled, and a fifth part more; and also having offered a progress, and to purge incumbrances, and to ratify the creditor's right; and the creditor having given a condescendence of incumbrances, some of which the debtor offered to take off by equivalents, and others being posterior to the creditor's right, could not prejudice it; the Lords consider'd, That tho' debtors used to retard the first adjudger, by offering a progress, &c. yet these partial adjudications had seldom or never taken effect, and that equivalents were not to be obtruded in place of actual purging of incumbrances; therefore they refused to restrict the creditor to a partial adjudication, unless the debtor either offered to purge them at the bar, or could instruct that they were already satisfied and paid. Fountainhall, 17th June 1709, Earl of Aberdeen *contra* Ld. Tolquhoun.

A SPECIAL adjudication having been led for the principal sum, annualrent, and the fifth part more; in a redemption of the sum within the five years, the debtor offered payment of the principal sum and annualrents, the composition paid to the superior, and expences of obtaining infestment, in terms of the statute. The Lords found the adjudication not redeemable without payment of the accumulate sum, being the principal sum, annualrents, and a fifth part more. 30th June 1737, Baillie *contra* Watson of Saughton.

IN an adjudication upon the act of parliament 1672, the Lords modified the price to be 18 years purchase, as to the certain and constant rent, and nine years as to the casual rent of coal. Dirleton, 24th July 1673, Laird of Kilbirnie *contra* Cunningham.

Decisions common to Adjudications and Apprisings.

And, 1^{mo}, of the debt which is the foundation of the diligence.

A COMPRISING was found null, because the sums decerned for were greater than the sums contained in the denunciation; nor was the
Pluris petitio. comprising

compriser allowed by declaration to alter the tenor of his decret. Had-
 dington, 19th July 1622, Laird of Lugtoun *contra* Cranstoun.-----A
 comprising led for more than was due, being upon a decret decern-
 ing for the full mails and duties, as bygone non-entry duties before
 declarator, was annulled *in totum*; nor would the Lords sustain it
quoad currentem summam, because they thought it indivisible, and so
 could not subsist in part, and fall in part, otherwise, the legal being ex-
 pired, it must have stood for ever an absolute right of property. Du-
 rie, 19th, Spotiswood (*Comprising*) 20th July 1631, Earl of Kinghorn
contra Strang.---The like, Hope (*Apprising*) 22d June 1613, Blackburn
contra Lamb.---It being objected to an adjudication, That the decret
 of constitution, upon which it proceeded, was null, in regard that it con-
 cludes against the debtor, upon no other passive title than that of charg-
 ed to enter heir; and yet that part of the debts therein decerned for,
 were acquired by the pursuer, after raising and executing the general
 charge; so that, with regard to these debts, the decret was without any
 foundation; the Lords sustain'd the objection, so as to strike these debts
 out of the accumulate sum, but not to annul the adjudication *in totum*.
 26th January 1739, creditors of Catrine *contra* Baird of Cowdam.
 ---An apprising was reduced *in totum*, a term's annualrent being ap-
 prised for more than was due. Here the apprising was led by the per-
 son himself who got payment of the term's annualrent. Stair, 20th
 June 1678, Scot *contra* Falconer.---A comprising was sustain'd, tho'
 led for the whole sum, after part of it had been discharged by the com-
 priser himself, in respect the debtor had appeared in the process of
 constitution, and neglected to found upon his discharge. But the Lords
 declared, That in redemption of the comprised lands, this Sum should
 be allowed. Durie, 11th February 1630, Ker *contra* Lempitlaw.---
 An apprising led by a trustee, for behoof of the cedent, upon a bond,
 whereof part was paid, was restricted to the principal sum and annualrents
 due, without penalties, or accumulations. Stair, Fountainhall, 31st Janu-
 ary 1679, Irvine *contra* Laird of Drum.---An apprising led by an assign-
 ney, for his own behoof, upon a bond, whereof part was paid to the ce-
 dent without the assigney's knowledge, restricted to the principal sum and
 annualrents, to be accumulate at the date of the apprising. *Ibidem*.---An
 assigney having knowingly apprised for more than was due, the appri-
 sing was restricted to the principal and current annualrents, without pe-
 nalties, failzies, or accumulation of the annualrents. *Ibidem*.---An
 apprising led by an assigney for a sum whereof the cedent had receiv-
 ed partial payments, restricted to the principal, current annualrents, and
 necessary expences, without accumulation of annualrents and penal-
 ties. Marcus (*Comprising*) February 1685, Hislefide *contra* Baillie.
 Marcus (*Comprising*) March, 1685, Crawford *contra* Oliphant.---
 It being contended, That an adjudication led for more than was due,
 is *in rigore juris* null *in totum*, being in its nature indivisible, and si-
 milar to other legal diligencies, which must be either unexceptionably
 good, or null *in totum*; and that tho' the Lords, *ex nobili officio*, may
 sustain such an adjudication, where innocently led, as a security for
 the sums that would be due, suppose no adjudication had been led;
 there's no law for accumulations, which have no foundation in equi-
 ty; yet, in this case, where the question was betwixt the debtor and
 an assigney, who knew not of the payments made to his cedent, the
 Lords sustain'd the adjudication for the principal sum and annualrents

accumulate at the date of the adjudication, and annualrents thereof, and for necessary charges, but found no accumulations due upon the necessary charges. What moved the Lords in this case, was, that tho' the objection *in rigore juris* was sufficient to cut down the adjudication, so as to take off all accumulations; yet the practice, where the question was with the debtor, and not with competing creditors, had a long while run the other way. 3d November 1738, Balfour *contra* Wilkison. ----- Two parties being bound in a bond, containing an obligation to relieve one another *pro rata*, one of them paid the debt, took an assignation to the whole, and thereafter a decret of cognition against the other party's heir for the one half. But in the adjudication, which narrated the assignation and decret of constitution, the lands are adjudged for payment of the whole sum. In a ranking the other creditors objected this *pluris petitio*, and insisted to have the adjudication reduced *in totum*. The Lords considered this as an innocent mistake, and sustain'd the adjudication as a security for the principal sum and annualrents truly due, to be accumulate at the date of the adjudication, but without penalties, or even necessary charges. 3d July 1739, creditors of provost Cunningham *contra* Montgomerie. --- An apprising led by a father in his own name, for a sum payable to him in liferent, and to his children in fee, which he was impowered to uplift and reemploy for their use, being quarrelled as null, L. 29 of annualrent appraised for, having been paid before; the Lords found the apprising simply null, *quoad* the father's liferent, but found it to subsist entire as to the fee belonging to the children. Marcus (*Comprising*)

March 1683, Baillie of Torwoodhead *contra* Gairner. --- The Lords refused to sustain partial payment of the penalty of a bond made to a liferenter of the principal sum, as a nullity, or ground to restrict an adjudication for the said principal sum and whole penalties, at the fier's instance. Forbes, 19th June 1711, creditors of Ross of Leith *contra* Gellie and Hall.

In an action for mails and duties, it being objected by the defender, That the adjudication was led for more than was due, and therefore null, the sum adjudged being accumulated at a term prior to the date of the adjudication; the Lords found no nullity, nor so much as ground of restriction in the adjudication, and in general, that adjudications accumulating at a preceeding term, without decerning for annualrents from that term, ought to be sustained, and that only such must be annul'd, or restricted, as decern for annualrents from the date of the accumulation. Forbes, 21 June 1705, Lady Innerleith *contra* Sir William Cockburn. The like, Forbes, 10th June 1709, Wilkies *contra* creditors of Wilkie. --- The same objection being obtruded to an adjudication in a declarator of expiration of the legal, it was again repelled; but the Lords gave it this effect, because of the unfavourableness of an expired legal, That if the Debtor paid the sums due by the adjudication within five months, the same should be purgable. Fountainhall, Forbes, 25th March 1707, Innes *contra* Earl of Broadalbin. --- It being objected to an adjudication, That the accumulate sum was partly made up of a bill bearing annualrent and penalty, which behov'd to void the adjudication *in totum*, seeing it was not an articulate adjudication, but all the debts brought into one accumulate sum, the adjudger yielded, that this behoved to be the consequence, did the bill in question belong to himself; but he pled, That he was only a trustee,

fee for the behoof of another, and it would be hard, that his barely executing a commission intrusted to him, should have the effect of cutting down his now debt, more than that of any third party for whose behoof the adjudication may also have been led; the Lords found the bill and adjudication, in so far as it proceeds thereon, void and null; but found this not sufficient to annul the adjudication *in totum*, in respect the indorsation to the adjudger bears, That the bill was indorsed in trust for the behoof of the indorser. 1st December 1738, creditors of Catrine *contra* Baird of Cowdam.

AN Apprising is valid, notwithstanding of articles of compensation against the appriser; because an appriser is not obliged to restrict his charge upon mutual claims that may be due by him to his debtor: For the proposing compensation is the work of a debtor against his creditor, not of a creditor against himself. Stair, 22d June 1680, Grant *contra* Grant. Marcus (*Comprising*) January 1683, Wright *contra* Earl of Annandale.

AN adjudication being led upon several grounds of debt, it was objected against some of the bonds, That they were null, upon the head of usury, in regard annualrent was pactioned from terms prior to the dates of the bonds, and yet no evidence given that the debtor received the money at these terms; on the contrary, the bonds bearing the receipts of the money indefinitely, the present time could only be understood; the Lords found the objection against the bonds not sufficient to annul them as usurious, but sustained it to open the legal of the adjudication, and to cut off the penalties and accumulations of the said bonds, and sustained the adjudications for the principal sums, penalties, and accumulations of the said bonds whereon the adjudication proceeded, except as to these bonds quarrelled, 20th December 1722, Henderson *contra* Graham of Kilmardinny. Here the case was cited, determined a year or two before, betwixt Halyburton of Newmains, and the Lady Monboddie, where an adjudication having been led upon a bond, without deducing the retention betwixt Martinmas 1672, and 1673, which was a trifle, and by oversight, the Lords did reduce it to a security for principal, annualrents, and necessary expences, not only as to that debt, but as to several others, against which no exception could be made.

Usurious stipulation.

AN apprising, in so far as led for termly failzies in an investment of annualrent, not sustained beyond the true interest and damage of the appriser, wherein it differs from an apprising led upon ordinary penalties in principal sums. Stair, 29th November 1677, Orrock *contra* Morice. ——— And even an ordinary penalty, where exorbitant, was restricted to the tenth part of the principal sum, and this even after adjudication was led. Stair, 30th November 1680, Earl of Panmuir *contra* Durham.

Exorbitant penalty.

What subjects are carried by Apprising and Adjudication.

NOTHING can be comprised but heritable subjects, or real rights,

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as tacks, or writs concerning real securities, as bonds to set tacks, and no bond for moveable sums, or other moveables may be comprised. Durie, 25th July 1623, Earl of Errol *contra* Laird of Bucky. Durie, 24th November 1638, Campbel *contra* Baxter. ----And therefore, an adjudication of an heritable bond was refused to be passed, the defunct having made the sum moveable by a charge. Durie, penult January 1627, Cowper *contra* Williamson. ----An heritable bond is adjudgable, even before the term of payment, tho' no infeftment has followed. Forbes, 26th June 1705, Stewart *contra* Stewart.

THE bygoncs before decret of apprising or adjudication, are not carried thereby, being moveable and the subject of arrestment. Durie, 13th March 1627, Macghie *contra* Livingston. Durie, 23d December 1630, Ogilvie *contra* Lord Ogilvie. ----Nor even the Duties falling betwixt denunciation and decret of apprising. Durie, 16th February 1633, Harper *contra* Cockburn. ----Nor those falling betwixt the citation in adjudication and decret. Falconer, 1st. February 1684, Anderson *contra* Anderson's tenants. ----But an adjudication upon a special charge carries bygoncs from the death of the predecessor who was last infeft, in the same way as they are carried by an adjudication *cognitionis causa*, and for the same reason, because there is no other method invented in law for carrying bygoncs in these cases. 13th February 1740, Dickson of Kilbucho *contra* apparent heir of Poldean.

AN apprising carries the reversion of the preferable apprising, which was found, tho' the denunciation whereupon it proceeded was prior to the denunciation upon the preferable apprising; and this, because of the stile of the Letters of apprising, bearing, all right competent, *or that may be competent* to the debtor. Durie, 18th November 1624, Kincaid *contra* Halyburton.

AN appriſer of the common good of Dyſart, purſuing for the tack-duty of the hand-bell, it was alledged, That theſe obventions and emoluments, being of a moveable nature, do not fall under adjudication. Answered, Theſe are the conſequence of a real right, and belong to the purſuer, as the profits of fairs would fall to the compriser of a barony; the Lords decerned in favours of the adjudger. Marcus (*Comprifings*) January 1686, Andrew Wilton *contra* the magiſtrates of Dyſart.

General clause in Apprising and Adjudication.

A GENERAL clause in an adjudication, *of all other lands*, without ſpecifying particulars, was found null and of no effect. But lands being adjudged under a certain name, *viz.* of a certain barony, all lands comprehended under that common designation, lying contiguous, were carried thereby, with the milns and woods thereon. Stair, Fountain-hall, 21st July 1680, appriſers of the eſtate of Enoch, competing. See Durie, 19th December 1638, Corſer *contra* Durie, where the contrary ſeems to have been found.

AN appriſing of a tenement, *with all right competent to the debtor*, was found to carry an infeftment of annualrent the debtor had

had over the tenement. Stair, 23d January 1674, Nisbet *contra* Mein.

A PARTY whose business was in some confusion, having disposed his estate irredeemably to his brother, but taking his back-bond to retrocess him, so soon as he should be relieved of his cautionries for him, and paid of what he owed him; and one creditor having adjudged, in special, the estate, and then the general clause being subjoined, *of all rights, &c.* and another having adjudged only the back-bond; the Lords found, that the general clause in the former adjudication carried this back-bond, and denuded the debtor, so that there was no room for the other special adjudication, and therefore preferred the first. Forbes, 21st December 1710, Fountainhall, 20th November 1711, Brown *contra* Sir William Menzies.

THE general clause in comprisings of lands, and *all right, interest, and claim of right, petitory or possessory, &c.* was not found to comprehend Teinds, being but a clause of title respecting lands, and extending no further. Fountainhall, 17th February 1702, Home *contra* Home.

Adjudications and Apprisings pass *periculo petentium*; and all defences reserved *contra executionem*, unless instantly verified.

IN a process of adjudication, at the instance of an assigney, for part of his cedent's wife's tocher, the cedent not having performed his part of the contract of marriage; the Lords nevertheless allowed the adjudication to proceed, but with the burden of the obligation in the said contract in favours of the wife. Home, February 1686, Shearer *contra* Cargill. — It being objected in a process of adjudication, That the debts were suspended, and reduction and improbation raised against the same, which ought to be first discussed; the defender was allowed to repute his reasons of reduction by way of defence, if instantly verified; if otherwise, the lands were ordained to be adjudged, with reservation of the reasons of reduction *contra executionem*. Stair, 26th July 1676, Boyd *contra* Boyd. — The Lords allowed reasons of reduction of a decret against an heir, served *cum beneficio*, instantly verified, to be received *incidenter*, in a process of adjudication upon the decret; but they reserved reasons of reduction not instantly verified, *contra executionem*, both as to relevancy and probation. Forbes, 8th November 1711, Lord and Lady Ormiston *contra* Hamilton. — A personal creditor was admitted to propound payment in an adjudication *contra hæreditatem jacentem* led by another creditor, the alledgance being instantly verified, and there being no other adjudication upon the estate. Falconer, 4th December 1685, Lord Yester *contra* Earl of Lauderdale. — The Lords refused to stop an adjudication, 'altho' a decret of forthcoming, which was the ground thereof, stood suspended, and tho' this adjudication was the first, but reserved all defences *contra executionem*, in the mails and duties there to be received; and this, because an adjudication is *processus & judicium summarium*. Fountainhall, 16th December 1707, Tod *contra* Scot.

Exceptions against the ground of debt, reserved *contra executionem*, unless instantly verified.

Adjudications
pass *periculo pe-*
tium, without
necessity to in-
struct the de-
bitor's right.

IN a process of adjudication, it was not found competent for a third party to plead upon a right preferable and exclusive of the right in the debtor's person, sought to be adjudged; for adjudications pass *periculo petentium*, and all defences are reserved *contra executionem*. Sair, Dirleton, 15th November 1666, Cheine *contra* Christie.----- The contrary formerly found; but there it was nottour to the whole Lords, that the debtor was denuded. Stair, 22d July 1664, Livingston *contra* hiers of line of Lord Forester.----- In a process of adjudication, the debtor not compearing, the Lords decerned, reserving all objections *contra executionem*; and this, notwithstanding that the superior of the lands craved to be adjudged, appeared and alleged, That his vassal the debtor was *ab ante* denuded in his favours, by a resignation *ad perpetuam remanentiam*; but, in this case, there being no other adjudication, and the adjudger suffering nothing by the delay, the Lords ordained, before extract, the parties to debate their interests. Stair, Dirleton, 30th November 1675, Kinloch *contra* Blair.----- A party compearing in a process of adjudication, and offering *instante* to instruct, that the debtor was denuded, and that himself was heritor of the lands, and that if the creditor would raise reduction, he would immediately produce his undoubted rights for onerous causes; yet the Lords refused to take in the reduction summarily, especially the party compearing being minor; and therefore adjudged, reserving all that party's defences *contra executionem*. Fountainhall, 21st June 1700, Lord Archibald Hamilton *contra* Murray of Halden.----- The like in an adjudication led upon the bond of an apparent heir, which the Lords refused to stop at the instance of a creditor of the defunct, offering instantly to debate, and exclude the apparent heir's interest in the estate, but allowed it to go out, reserving the interest of the defunct's creditor, *contra executionem*. Forbes, 19th March 1707, Buchanan of Sandside *contra* Marquis of Montrose.----- In a process of adjudication, compearance being made for one who produced a disposition of the lands, with a base infestment thereon, repeteing a reduction, and craving that the adjudication might be stopp'd, *medio tempore*, his reasons being *injure*, and instantly verified; the Lords found, That before any adjudication, the compearer might insist on such reasons of reduction and nullity, as were instantly verified; but ordained him to condescend thereon, that it might appear of what kind they were. Fountainhall, 31st January 1712, Calder *contra* Ogilvie.----- The Lords found, That where adjudications are craved upon the bonds of apparent heirs, and there is no nottoriety of their predecessors having been heritors of these lands, and that there is no concurrence of creditors striving for diligence, there ought to be no decret of adjudication, till they give some document, that the predecessor once had right to the lands craved to be adjudged, by a sasine, or some other evident, and that the debtor had a contingency of blood to the defunct. Fountainhall, 7th February 1669, Gordon *contra* Forbeses.----- An apparent heir having granted a bond in trust, in order to lead an adjudication against his predecessor's estate, a piece of land sold by the predecessor, wherein the purchaser was infest and in possession, was struck out of the adjudication, the purchaser offering to hold the adjudication as led, in so far as to be a title to found all objections against the purchase. 19th July 1734, Duff *contra* Ogilvie.

By the oldest decisions the superior was not bound to infest a com-
priser,

priser, without instructing his author's right. Hope, (*Superior*) 14th December 1615, Monteith *contra* Elphinston. Hope (*Superior*) ult. June 1619, Lord Corstorphin *contra* Wardlaw. Durie, 14th February 1629, Grant *contra* Lord Balveny. Durie, 12th March 1629, Colmslie *contra* Earl of Roxburgh. But this was altered by the latter Decisions; and superiors are now bound to infest apprisers, *salvo jure cujuslibet & suo*, which was found, tho' the person charged to grant infestment contended, That he was absolute proprietar of the lands. Durie, 17th July 1632, Black *contra* Pitmedden. Durie, 11th March 1636, Scot *contra* Elliot. Durie, 29th March 1636, Cowan *contra* Lord Elphinston. — Yet in an adjudication in implement of a disposition, it was found, That this privilege did not take place; for it was contended, tho' superiors are obliged to infest apprisers, *salvo jure cujuslibet*, where they get a year's rent, as also, ordinary adjudgers for liquid debts, *favore creditorum*, these considerations have no place here. Stair, 24th June 1663, M' Dougal *contra* Laird Glentworthie. — Adjudgers of the *hereditas jacens*, found to have this privilege, tho' it was not till afterwards that the superior was allowed a year's rent for entering them. Stair, 9th February 1667, Ramsay *contra* Ker.

EXCEPTIONS against adjudication after it is led, how proportionable. See Competent.

Allowance of Apprising, and abreviate of Adjudication.

A COMPRISE was sustained whereupon infestment had followed, altho' not allowed, because the Lords allowance is only craved, to the effect charges may be obtained thereupon against the superior. Auchinleck (*Comprising*) 27th July 1630, Gilmor *contra* Gilmor. N. B. This was before the act anent allowances.

THE Lords sustained, the filling up of a greater sum, in the recorded allowance of an adjudication, than the sum truly due contained in the decret itself, as a ground to take off the expiration of the legal of that adjudication, but not to bring in another adjudication, without year and day thereof *pari passu* with it. Forbes, 22d February 1712, Nairne of Drumkilbo *contra* M' Cleland.

Nature and effect of this diligence.

THE question occurred anent the nature of an apprising or adjudication, If it is an absolute transference of property in satisfaction of the debt, with a faculty of redemption within a limited time, or, if only a legal disposition *in security and payment*. The import of the question was, If an adjudication be but a security, or *pignus prætorium*, the by-gone annualrents due upon the capital, the creditor dying during the legal, must go to his executors; whereas, if it be of the nature of a proper sale, under redemption, the land comes in place of the debt, which

Nature of
this diligence.

land must descend to the heir, leaving the bygone rents not uplifted to be claimed by the executor; but there remains no debt to be claimed principal or interest; the Lords found, That the apprising, and whole sums therein contained, without distinction betwixt principal sum and annualrents, accumulate sum and annualrents thereof, or accessories thereto, do belong to the heir, and no part thereof to the executor, notwithstanding the appriser died within the legal. 3d February 1738, Ramsay *contra* creditors of Clapperton.

Effect of a
simple decret
of adjudication
or apprising.

A COMPRISING was found not a sufficient title in an action of mails and duties, unless *sañe* had been obtained, or diligence done for obtaining thereof. Durie, 5th March 1628, Scot *contra* tenants of Whitlaid. — But now, as to mails and duties, a decret of apprising is understood an effectual diligence and equivalent to an assignation intimated, as to which, see Tit. *Competition*. — A comprising is a legal assignation, needing no intimation, and therefore a second comprising of a right of reversion, tho' first intimated, was found not preferable. Hope, (*Apprising*) 3d February 1619, Bruce *contra* Buckie. — Upon the same footing, a discharge of a bond granted by the common debtor, after the bond was comprised, was found null. Durie, 25th March 1635, Lord Yester *contra* Laird Innerweik. — A proprietor having disposed his estate, with a reservation to himself of a yearly annuity, payable furth thereof, during his life; the said reserved liferent was comprised by two of his creditors, and the last comprising being first made real by infestment; it was contended, That it ought to be preferable, because the debtor remained infest, in so far as he was not denuded by the disposition; and therefore the reserved annuity could not be carried but by infestment. Pled on the other hand, That the debtor was fully denuded, that the reserved liferent was indeed a burden upon the subject, but was not a right constitute by infestment, and therefore was carried by a simple decret of comprising; the Lords preferred the first comprising. Durie, 21st March 1634, Maxwell *contra* Murray. — In a contract of wadset, the proprietor having disposed his lands, holding feu of himself, with a clause of reversion, obliging the wadsetter to renounce his right of wadset, upon payment of 5000 Merks; it was found, That a simple decret of adjudication, was sufficient to carry the reversion of this wadset-right, without necessity of infestment, or charge against the superior, and therefore, preferable to posterior adjudications with a charge against the superior not within year and day. Home, 31st January 1727, competition betwixt the Dutchess of Argyle and M'Neil of Loffet.

A decret of
apprising or
adjudication,
falls not by the
debtor's
death.

AN apprising, deduced upon a special charge, is an effectual diligence, tho' the apparent heir, who was charged, die before infestment pass upon the apprising or charge against the superior, and the appriser upon his decret may proceed to charge the superior, and to demand infestment when he pleases. Stair, 6th February 1668, Johnston *contra* Erskine. — But still without prejudice to the apparent heirs of the debtor, in case he die before the appriser be infest, to serve and retour themselves in the lands; and tho' the comprising should throw in his comprising before the inquest, that would not stop the service and retour, unless he also produced a *sañe* thereupon. Spotswood (*Comprising*) 15th February 1555, Comptroller *contra* Lord Sempil. —

The

The Lords refused to allow an apprifing after the death of the party, againft whom it was led. Durie, penult July 1625, Guthrie fuppl-
cant. Yet thereafter, Stair, 8th June 1665, upon fupplication, they
ordained an apprifing to be allowed; albeit, not only the debtor, a-
gainft whom it was deduced, was dead, but the fixty days long expired;
which fummur ftep was in refpect of the act of parliament 1661, *Cap.*
31. in order to found a preference againft pofterior apprifings.

A CHARGE againft the fuperior without further diligence, is fuffi-
cient in a competition, even with other adjudgers infeft. Stair, 17th
June 1662, Herron *contra* Stevenfon. As to the effect of a charge in
competition with voluntary rights. See *Competition*.

Effect of an
adjudication
with a charge
againft the fu-
perior.

No perfonal diligence can be ufed againft a debtor after comprifing,
provided he offer to his creditor poffeffion of the lands comprifed;
and it was found, if the comprifer will not accept of poffeffion, that
he ought *eo cafu*, either to renounce his comprifing, or to forbear per-
fonal diligence. Durie, 22d January 1631, Cloverhill *contra* Moodie.
Durie, penult January 1628, Meldrum *contra* Laird of Cluny. Du-
rie, 7th December 1631, Scarlet *contra* Paterfon. — But a comprifer
was allowed to retain his fecurity, and at the fame time to do perfo-
nal execution againft his debtor, unlefs he had alfo attained poffeffion.
Durie, 23d June 1627, Sinclair *contra* Bruce. But if the apprif-
er has any feparate fecurity for his debt, there is nothing to bar him from
putting the fame to execution. Durie, 15th March 1628, Lord
Blantyre *contra* parifhoners of Bothwell.

Perfonal dili-
gence ufed by
the apprif-
er.

Apprifers and Adjudgers may be reftricted in their poffeffion, to their neat annualrents.

IN reftricting an apprifing to a portion of the lands fufficient for the
annualrent, which the Lords are impowered to do by act 62. parlia-
ment 1661; they gave the apprif-er his option of any of the apprifed
lands, except the debtor's houfe and mains. Stair, 27th June 1662,
Wilfon *contra* Murray.

THE Lords found, That the clause in the act of parliament 1661,
impowering their Lordships to reftrict the creditor, is a perpetual law,
and does regulate comprifings, as well deduced after the act as before.
Home, December 1683. Falconer, 16th, Fountainhall, 20th
February 1684, Wilfon *contra* Home.

CASSIE elder of Kirkhoufe, in the year 1715, was attainted of high
treafon, and his eftate was found to belong to his fon, upon this *me-*
dium, That it being a tailzied fubject, the father had incurred the irri-
tancies, and fallen from his right before his rebellion. The Lady
Kirkhoufe, fpoufe to Kirkhoufe elder, in her contract of marriage was
provided to the liferent of 1000 Merks, to take place after her huf-
band's deceafe; but after the fee was eftablifhed in her fon, having
infifted againft her husband for a feparate aliment, upon the head of
maltreatment, ſhe not only obtained her fon to be made liable for a
feparate aliment, but likewise, upon the act 1661, obtained, That the

adjudgers upon the estate, should be obliged to restrict themselves to their annualrents during the legal, that there might be room for her to affect the rents of the estate for that aliment. November 1728, Lady Kirkhouse *contra* her husband and son, and their creditors.

Ranking of Adjudgers and Apprisers.

Apprisings and
adjudications
upon *debita
fundi*.

APPRISINGS and adjudications upon *debita fundi*, from the nature of the subject, are preferable to all others prior or posterior: Thus the Lords preferred a comprising for bygone annualrents of an heritable bond, to a simple comprising, tho' prior in date. Hope (*Apprising*.)

June 1610, Harris *contra* Aslowan. — And thus, a comprising for the king's blench duty, found preferable to all infeftments anterior, by disposition or comprising. Hope, (*Blench duty*) 9th December 1629, Moncrief *contra* Laird of Balnagowan. — And an adjudication for bygone feu-duties, was preferred to prior comprisings upon personal debt. Gosford, 7th July 1675, Scrimzeour *contra* Earl of Northesk. — An adjudication being led for payment of a sum contained in an heritable bond with infeftment, in a ranking of the creditors, the adjudger pled preference, not only for his principal sum and annualrents secured by infeftment, but for the annualrent of annualrent accumulated in the adjudication; the Lords found, That the adjudication being upon the personal obligation, and not upon the pointing of the ground, had no preference as to the accumulations, but was only to be ranked with the other adjudications. Dalrymple, 27th January 1699, M'Kenzie of Roschaugh *contra* creditors of Cockburn.

Adjudications
in security.

ADJUDICATIONS in security come in *pari passu* with simple adjudications for liquid sums. And so it was found in the case of an adjudication led upon a wife's contract of marriage, not only for the bygone annuities, but in time coming. Fountainhall, 2d January, Home, March 1684, Bruce *contra* Hepburn. — The like in the ranking of the creditors of Easter-Ogle, where an adjudication, led in security of the daughter's bond of provision, the term of payment whereof was not till her age of 18, ten years after the competition, was preferr'd to such adjudications as were not within year and day, tho' led upon bonds whereof the term of payment was past. Home, 24th January 1724, Miss Lyon *contra* Easter-Ogle's creditors.

Adjudication
in implement.

FOUND, That an adjudication led within year and day of another, could not come in *pari passu* with it, because the first was for a liquid debt, and the second only special for implement of a disposition, which the Lords thought was not included in the 62 act, parliament 1661; yet, says the author, The equity is the same in both, *sed agit remedio imperatorio*. Fountainhall, 13th February 1680, Adam *contra* Alifon. — The like, Stair, 12th December 1677, Lady Frazer *contra* creditors of Lord Frazer. — In a competition betwixt two adjudications, both of them being for implement of dispositions, but the one had charged the superior to infeft him, which the other had not done; the Lords thought the diligence, by charging the superior, warrantable, and that to find otherwise were to make all adjudications ineffectual.

ineffectual that have been led for implement of dispositions, and therefore preferr'd him who had charged on his adjudication before the other, who, apprehending that superiors are not obliged to enter parties on such charges, did neglect that step of diligence as superfluous, and not mentioned in the act 36, parliament 1469, which speaks only of creditors. Fountainhall, Dalrymple, 21st June 1704, Sinclair *contra* Sinclair.

IN a competition about mails and duties betwixt three apprisers that had not the benefit of the act of parliament 1661, bringing in apprisers *pari passu*; the first and third apprisers were infest, but not the second; and it was argued for the last appriser, tho' the second apprising carries the reversion of the first without infestment, yet the question being for the mails and duties, a right of reversion cannot carry these without a *fasine*. The Lords considering the great disadvantage the lieges would sustain, if all apprisers were necessitate to take infestment, preferred the second appriser to the third. Stair, 22d December 1664, Ramfay *contra* Hog.

Ordinary apprisings and adjudications.

APPRISINGS led after January 1652, come not in *pari passu* with those led before, tho' within year and day. Stair, Dirleton, 12th December 1666, Home *contra* creditors of Kello. The contrary seems to have been found, Stair, 24th January 1663, Graham *contra* Ross.

THE Lords brought in a comprising, led two years before the first effectual one perfected by infestment, *pari passu*, as if it had been within year and day of it; tho' the 62 Act, parliament 1661, seems only to speak of apprisings posterior to the first effectual one, and not of prior apprisings, except they be within year and day of them. Fountainhall, 21st December 1680, Forbes of Savock *contra* Buchan.

ONE adjudger having first obtain'd a charter from the superior, and, a few days thereafter, another adjudger charging the same superior to infest him, which is all the diligence necessary to be done during the legal; and, after two years, the adjudger who had the charter infesting himself thereon. The Lords, in the competition, thought, that if only a few days or weeks had interveen'd betwixt the charter and *fasine*, a charge coming betwixt, might have had the less to plead: But there being a *mora* of two years, the obtainer of the charter was plainly negligent, and therefore found, That the giver of the charge had the first effectual adjudication, but brought in the other *pari passu* with him. Fountainhall, Dalrymple, 27th December 1705, Butter *contra* Fotheringhame.

APPRISERS are only brought in *pari passu* with the first effectual apprising who are within year and day of the decret, and not those who are within year and day of the charge, or infestment following thereupon. Stair, 4th July 1671, Ld. of Balfour *contra* Douglass, Fountainhall, 26th July 1678, Ld. Rickarton *contra* Countess of Traquair.

APPRISINGS must be all within year and day of the first effectual, to bring them in *pari passu*; and even after the first apprising is extinguish'd

guish'd by payment, the posterior apprisings, within year and day of the second, are not brought in *pari passu* with it, unless they had been also within year and day of the first. Stair, 13th, Gosford, 14th December 1672, Street *contra* Earl of Northesk.----Nor are these posterior apprisings even brought in *pari passu* among themselves, but are preferable according to their dates. Gosford, 22d July 1675, Boyd *contra* Maloch.----Infeftment upon the first apprising is communicated to all apprisings led within year and day; and tho' the first apprising be satisfied by intromission, the infeftment does not become extinct *simpliciter*, but subsists as to the other apprisings; and therefore a second apprising within year and day, tho' not infeft, was preferred to a posterior apprising without year and day, tho' infeft. Stair, 7th November 1679, Straiton *contra* Bell.----A first compriser, whose diligence is completed by infeftment within the year and day of the rebellion, taking the gift of the common debtor's escheat, after the said rebellion, and before the leading of a second comprising, which yet is within year and day of the first, cannot prejudice the second compriser by his gift: For if he plead upon his comprising, that second compriser comes in *pari passu* with him; if upon his gift, he is excluded by the second compriser having the benefit of the first compriser's infeftment, and the first compriser cannot pass from his comprising, so as to hinder the second compriser to take the benefit thereof, seeing that benefit is founded in the publick law, and cannot be disappointed by the deeds of private parties. Gosford, Stair, 28th January 1676, M'Lurg *contra* Murray.

IN a competition betwixt two adjudgers, the common debtor's right being a disposition to lands, with procuratory and precept, but no infeftment, the first adjudger pled preference, his adjudication which denuded the debtor of his personal right being first completed, and the other adjudger was not within year and day; and here he had made one step further, tho' not necessary, which was a charge against the superior. It was pled for the other adjudger, That his was the first completed and perfected right, in so far as, after having adjudged the disposition, he went on to take infeftment upon the procuratory and precept therein contained. The Lords brought them in *pari passu*, which was in other words, finding the last adjudication the first effectual. Fountainhall, 6th December 1695, Dewar *contra* French.----In a competition amongst adjudgers, all within year and day, the subject adjudged being a disposition, procuratory and precept, but upon which infeftment had not followed; the first adjudger craved preference, because his adjudication totally denuded the debtor, having only a personal right; and as to the other adjudgers within year and day, he pled, That the act 1661 does only regulate adjudications of subjects whereupon infeftment is taken, and this from the words of the act describing the first effectual apprising, which is declared to be by the first infeftment or charge against the superior: And the act also supposes, That other apprisings may be led before the first effectual. All which particulars are inconsistent with apprisings of personal rights; the first apprising in such being always the *first effectual*. It was answered, That the preamble of this clause in the act is general, and respects all apprisings, whether of real or personal subjects, *viz. That creditors at a distance are preveen'd by the more timeous diligence of other creditors.* And

And the clause mentioning the first effectual apprising, is not intended as an adequate description of the first effectual apprising, but as a particular example of what indeed is the common case. The Lords brought the adjudgers *in pari passu*. December 1725, Sir Thomas Moncrief *contra* the creditors of Moncrief.----The like as to an heritable bond, not clothed with infeftment. Dalrymple, Fountainhall, Forbes, 26th June 1705, Stewart *contra* Stewart.-----A personal bond bearing substitutions, and consequently heretable *destinatione*, was adjudged by several creditors; the Lords found, That the act bringing in adjudgers *pari passu*, does not take place in this case, being a subject upon which infeftment could not pass, and therefore they preferred the first adjudger.

February 1729, Sir John Sinclair *contra* Mrs. Elizabeth Gibson.----The *pari passu* preference, introduced by the act of parliament 1661, takes place in adjudications of personal bonds for sums of money, heretable by the clause secluding executors. 19th November 1734, Alexander Jackson *contra* Drummond of Gairdrum.----Adjudications led against a debtor, who had in his person a disposition to lands, without procuratory or precept, brought in *pari passu*. 27th June 1734, relict of Mr. Alexander Falconer *contra* his creditors:

A DISPOSITION to lands in a debtor's person, without procuratory or precept, being affected by several adjudications at the instance of creditors coming in *pari passu* within year and day, one of the adjudgers went on to complete her right to the lands, by adjudging in implement against the disposer, whereupon infeftment followed: And it was pled for her, That tho' the other adjudgers did come in *pari passu* with respect to the common debtor's right, *sciz.* the disposition without procuratory or precept, that did not hinder her to be preferable in the land itself, which she only had affected by her adjudication in implement. The Lords brought in all the adjudications *pari passu*; and found, That the infeftment obtain'd, does accresce to the other creditors, upon their paying a proportional part of the expences. 27th June 1734, Relict of Mr. Alexander Falconer *contra* his creditors.

OTHER apprisings, seeking to come in *pari passu* with him who has the first infeftment, are bound to relieve him of the whole composition, and other expences of adjudication and infeftment, that being all the posterior apprisers pay for getting the benefit of the act. Stair, 5th February 1663, Graham *contra* Ross. Stair, 16th January, 1680, Gordon *contra* Hunter. Gosford, 18th December 1668, Chisholm *contra* Stevenson.-----In a competition among apprisers, the Lords found, That the composition paid to the superior, ought to be paid out of the fore-end of the rents of the lands, as being the expence of the first effectual comprising, and then, and not till then, decerned the tenants to pay the rents to all the rest of the comprisers that were to come in *pari passu*, according to their respective rights. Home, November 1682, Gardnefs *contra* Jousie and Ld. Drum.-----Tho' a second apprifer will not come in *pari passu* with the first, till the expences of the first apprisers infeftment be paid; yet the Lords refused to allow the expences of changing the holding from ward to taxward, seeing the other apprifer declared he was to take no benefit by the same. Falconer, 20th February 1683, Ld. Bearford *contra* tenants of Craig.

SEVERAL charges against the superior being given on one day, upon different adjudications, without expressing the time or hour of the day; the Lords found, That these different adjudications come in *pari passu* with one another, or such as are prior, or within year and day. Home, 31st January 1727, Competition dutcheffs of Argyle with M'Neil of Loffet.

THE Lords refused to bring in an adjudication *pari passu* with other adjudications, altho' it was within year and day of the first adjudication before the Lords, but was not within year and day of the first effectual adjudication, on a *cognitionis causa* against the apparent heir renouncing, obtain'd before the sheriffs. Forbes, 23d, Fountainhall, 24th December 1709, creditors of Marfhal *contra* Lord Pencaitland.

THE estate of Crimmonmogat was posselt very near the term of the long prescription, by charter and sasine passing upon a decreet of apprising, at one Peter Meldrum's instance, and had gone through the hands of several purchasers; at last Towie appear'd, who had an apprising led within year and day of Meldrum's, and craved to be brought in *pari passu* with the present proprietor, according to the act 62, parliament 1661. It was objected, That apprisers are only brought in *pari passu* during the currency of the legal; and that Towie cannot have the benefit of the act 1661, now so long after expiry of the legal, otherwise there is no security in the records. The Lords found, That the privilege introduced by the act of parliament 1661 in favours of adjudgers, before or within year and day of the first effectual apprising, is competent to the saids adjudgers against the singular successors of the the first effectual appriser, as well after the expiry of the legal, as within the same. 23d June 1720, Barclay of Towie *contra* creditors of Crimmonmogat.

THE year and day is not counted by the number of days, but by the return of the day of the next year that bears the same denomination; therefore an adjudication, upon the 31st July 1680, was brought in *pari passu* with one led 30th July 1679, as being within year and day, tho' not within 367 days. Stair, 26th January 1681, Lady Bangour *contra* Hamilton.

Legal of Apprisings and Adjudications.

THE legal reversion of comprisings expires in seven years from the date of the comprising, and not from the time of the Lords allowance thereof, or from the time of the Infestment following thereupon. Spotiswood (*Comprising*) Durie, 11th November 1630, Laird Limptlaw *contra* Aikenhead.

THE legal of an apprising is prorogated by a simple order of redemption without declarator. Stair, 7th July 1676, Edgar *contra* Mill.—An apprising bought in by an apparent heir is redeemable within ten years by the creditors; and this legal was found prorogated by a declarator raised within the ten years, craving compt and reckoning for the apparent heir's intromission, and offering payment for the super-plus,

plus. Stair, 26th June 1677, Kincaid *contra* Gordon. ----- Found that a party's taking the annualrent of the sum in his comprising from his debtor, after the legal was expired, was not a formal prorogating of the legal, tho' it seem'd to dispense with it *tacite*: However the Lords super-feded to declare the expiration of the legal till Whitsunday then next; that if the debtor pleased to redeem betwixt and that time, he might. Fountainhall, 17th December 1686, Lord Bargeny *contra* Lin of Largs.

----- Two different estates being apprifed for the same debt, an order of premonition and consignation, used by the proprietor of one of the Subjects, within the legal, was found to keep the legal of the apprifing open as to both subjects. Stair, 10th February 1675, Lady Torwood-head *contra* Gardners. ----- The principal sum, whole annualrents, and necessary debursments to be modified, being paid by intromission within the legal; the Lords found, That this did stop the expiring of it, altho' penalties and sheriff-fees were not satisfied that were contain'd in the comprising. Gosford, 20th June 1677, Orrock *contra* Morrice. ----- Rents due before the expiring of the legal, are to be imputed towards extinguishing the comprising, tho' they have not been received till after expiring of the legal. Durie, 16th January 1634, tutor of Balma-ghie *contra* Maxwell. ----- An adjudication being led for divers sums, some whereof were prior to an inhibition served by another creditor, and others posterior; and the adjudication being expired without any intromission, or other payment made to the adjudger within the legal, the Lords found, That the legal conveyed the whole right of the lands adjudged, without respect to the sums contracted after the inhibition, or tho' part of them had been paid within the legal. Fountainhall, 6th July 1699, Hay of Alderston *contra* Hays.

If the apprifiser continue to possess after expiry of the legal, the debt is thereby satisfied and extinguished, and the apprifing turn'd into an absolute right of property, which was found, tho' the apprifing proved ineffectual as to a great part of the lands apprifed, the remainder being equivalent to the debt apprifed for. Stair, 18th June 1675, Ld. of Leyes *contra* Forbes.

Extinction of Apprifings and Adjudications.

AN apprifiser found comptable, not only for the seven, but for the whole years of his debtor's minority. Stair, 18th February 1663, M'Kenzie *contra* Ross.

AN apprifiser having sold a part of the apprifed lands within the legal, it was pled, That the real worth of these lands ought to be imputed in extinction of the sums in the apprifing. Answered, The apprifiser could not dispone the lands simply, but only his right of apprifing, which would still be redeemable from his assigney, as well as from himself; and therefore the Lords found, he was not countable for the whole value of the lands dispon'd, but for what sums he actually received. Stair, 14th January 1669, M'Kenzie *contra* Ross.

A SECOND compriser having pursued a declarator, that the prior was satisfied by intromission; and the defender having given in an ac-
F. compt

compt of debursments for prosecuting and defending of processses concerning his right, the Lords, in the compt and reckoning, found, That the expences in deducing comprising, and obtaining infeftment, were only to be allow'd, but no other debursments, yet they allow'd him retention of the superplus, after extinguishing the comprising for what was profitably expended, not only in relation to his own, but the pursuer's right. Dirleton, 26th June 1677, Malloch *contra* relict of Boyd. — The heir of an appriiser of ward lands, having paid 4000 merks as the avail of a marriage which fell by his predecessor's death, his intromissions with the mails and duties were ascribed to it, at least he was found to have right to repete the same off the debtor before the apprising could be extinguished. Marcus (*Comprisings*) March 1684, German of Dryburgh *contra* Gray of Innerrichty.

Redemption of Apprisings and Adjudications.

A SECOND compriser having used an order of redemption against a first, the same was found effectual to the third appriiser redeeming the second within the legal; and it was found, That the order could not be passed from in his prejudice. Stair, 20th February 1679, tenants of Morton *contra* Earl Queensberry.

AN apprising led against an apparent heir, lawfully charged to enter, was found redeemable after the apparent heir's death, by the heir of the person last infeft, tho' he did not represent the apparent heir against whom it was led. Stair, Gosford, 19th January 1669, Johnston *contra* Lord Lyon.

FOUND, That he who redeems from a compriser, ought to pay the year's duty of the lands, which is due to the superior by act of parliament, altho' the superior had given it *gratis* to the compriser; for if he received him for service, or any such personal respect, that ought not to be profitable to the redeemer. And the same was found with respect to the expences debursed by the compriser in deducing his comprising, altho' he got it done *gratis*, since there is no reason the redeemer should be free of paying the expences in such cases ordinarily paid by others: And this their Lordships declared they would observe thereafter when such cases occur'd. Durie, 2d July 1625, Dr. Kincaid *contra* Halyburton. — An appriiser may repair and uphold the houses, and, upon redemption, is intitled to the expences thereof, but, in order thereto, he should intent action to have the condition of the houses tried at the time of his comprising, and after the reparations are found necessary, he may deburse the same, and obtain them cognosced, as accords. Durie, penult November 1628, Livingston *contra* Ld. Bafs.

ADJUDICATION a summary process. See *Summar Process*.

YEAR's rent payable to the superior. See *Superior and Vassal*.

SUPERIOR may redeem adjudications. *Ibidem*.

WHEN requisition or a charge is necessary upon heritable bonds, in order to lead adjudication. See *Legal Diligence*.

IF

IF adjudication may be led upon a debt in diem, conditional, &c. See Legal Diligence.

ADJUDICATION led upon a debt, whereof the foundation is defective, or where the debt is not fully established in the creditor's person, how far it vitiates the diligence. See Quod ab initio vitiosum.

APPRISING or adjudication carries not a right to the fruits as it does to the subject itself, giving only a power or faculty to intromet. See Right in Security.

DILIGENCE required of apprisers and adjudgers. See Diligence.

APPRISING and adjudication makes the subject litigious. See Litigious.

EXECUTIONS of adjudications and apprisings. See Execution.

RECORDING of adjudications and apprisings. See Registration.

IF one adjudger can remove a tenant without concurrence of the other adjudgers. See Solidum, & Pro rata.

PAYMENT or intromission if good against a singular successor in an apprising. See Personal and Real.

A D U L T E R Y.

AN heiress divorced for adultery, loses not only her conjunct-fee and tocher, but also the liferent of her heritage, and the courtesy takes place as if she were naturally dead. Colvil, March 1589, Ld. Innerwick *contra* the Lady.

THE Lords inclined to sustain a gift of escheat for adultery, tho' the party was not denounced to the horn, nor was there any sentence past in a criminal court, which the acts of parliament, touching adultery, seem to require; only there was a decret of the commissaries, finding the marriage adulterous and unlawful. The two grounds that moved the Lords complexly, were, 1^{mo}, That the escheat in such crimes falls *ipso jure*, & *ex lege sine facto hominis*. 2^{do}, That here there was a formal gift on the woman's being denounced fugitive, which was conjoined by way of reply, tho' the declarator on it was not yet come. Fountainhall, 3d February 1698, Irvine *contra* Skene.

'Tis unlawful for the person divorced to marry the person with whom the crime of adultery was committed, and the children begotten of such unlawful conjunction, are unhabile to succeed as heirs to their parents, act 20, parliament 1600. Gosford, 22d June 1670, Lyle *contra* Douglass.

IN a reduction of a decreet of divorce, obtain'd by a wife against her husband for his adultery, upon this ground of iniquity, that the commissaries repelled this defence, "That after the acts of adultery, the wife co-habited with her husband as man and wife;" which import-ed her passing from any prior injury known to her. The Lords found, That their conversing together as man and wife, after the deeds of adultery were known to her, did infer the passing from divorce on these deeds; and found cohabitation a sufficient presumptive probation of the wife's converse with the husband as wife, unless she prove that she withdrew from the husband's bed, and lay in a separate room from him: In which case it must be proven, that she had carnal dealing with him, at least lay in bed with him. Stair, 15th July 1681, Wat-son *contra* Cruikshank.

A D V O C A T E

AN advocate refusing to serve any of the lieges against a Lord of session, not having a lawful excuse, was compelled thereto under pain of deprivation. Haddington, 22d June 1605, Lord Balmerino *contra* Forrester.

ADVOCATES admitted by the Lords, are privileg'd to procure in all courts of the kingdom; but if they offer any indignity to any inferior judge, sitting in judgment, he may condemn them in an amand, or suspend or deprive them from procuring before him, according to the quality of the offence. Haddington, 28th November 1609, commissaries of Edinburgh *contra* Mr. John Ruffel.

AN advocate may compare for parties within the kingdom, without producing any mandate, and even when he officiously compares without warrant, this may make him liable for the party's damage, but will not weaken the decreet. Stair, 7th December 1676, Ballantine *contra* Edgar.

AN advocate cannot disclaim his client's superior without a special mandate. Erskine, 2d January 1592. — A Defender craving protection, and the pursuer's procurator desiring a day to be assign'd, at which, if they insisted not, they declared themselves content that absolution should be given *simpliciter* from the pursuit, just as if they had been summoned to insist with that certification; the Lords found, seeing the pursuer himself was not present to take the day with that certification, that no such day could be taken by or assigned to advocates, which might bind their constituents, they not being summon'd for that effect. Durie, 20th March 1630, Ld. of Wardis *contra* his creditors. — A decreet arbitral being challenged by reduction, as being to the enorm lesion of a minor, one of the parties in the submission, it was not sustain'd as a homologation, that the pursuer's procurators, in a process against third parties upon the decreet arbitral, had made some judicial steps, unless the compareance had been in virtue of a special mandate,

date. Gosford, 14th February 1677, Duke and Dutcheſs of Munmouth *contra* Earl of Tweddale.

AN advocate cannot appear for parties out of the kingdom without a written mandate. Stair, 3d February 1681, *contra* Stewart. — An advocate compearing for a defender out of the kingdom, was allowed by the Lords, in virtue of the privilege of his gown, to ſee the proceſs, tho' not to plead and make defences, without a ſpecial mandate. Forbes, 31ſt July 1708, Butler and Gordon *contra* Ragg, Forbes, 10th July 1712, Hamilton *contra* Boyd. — The Lords ſuſtain'd action at a ſtranger's inſtance, tho' no mandate was produced, his advocate finding caution to produce it before *litis-conteſtation*. Auchinleck, 15th December 1629, Paterſon *contra* Alexander. — In a reduction of an admiral's decreet againſt a ſtranger, at the ſaid ſtranger's inſtance, altho' he was neither in the country aſſiſting the purſuit, nor any procuratory given by him to purſue, yet the action was ſuſtain'd, ſeeing the ſame advocate compear'd for him in this reduction, who had defended in the decreet obtain'd againſt him before the admiral, only he was ordain'd to produce a procuratory authoriſing the purſuit before *litis-conteſtation*, and that caution ſhould be found for that effect. Durie, 15th December 1629, Paterſon *contra* Alexander. — The purſuer being in the kingdom at the intenting and calling of his proceſs, his advocate may continue his appearance for him without a ſpecial mandate, tho', during the courſe of the proceſs, he be occaſionally out of the kingdom. Fountainhall, 7th December 1693, Melvil *contra* Earl of Perth, Dalrymple, 7th June 1715, Earl Marchmont *contra* Ld. Wedderburn.

A PERSON having been advocate for a deceas'd defender, againſt whom a decreet was put up before his deceaſe, and the ſaid decreet being now quarrell'd as unwarrantably extract'd; the Lords found, That the advocate had ſtill intereſt to propound objections againſt the ſaid decreet, in order to the rectification thereof; and that as procurator for the defunct defender, as if the ſame had been propounded before extracting; tho' this was to make him an advocate without a conſtituent, and to make his mandate continue *mortuo mandante*, and to hinder apparent heirs to ſtate themſelves the *veri & legitimi contradictores* to their predeceſſor's creditors; but the Lords thought it a part of an advocate's faithfulneſs and duty to carry on the proceſs begun, ſeeing, *res non eſt integra, & mandatum tali caſu, morte mandantis non ceſſat*, and that he has a rational intereſt to ſee rectified what he finds his deceas'd conſtituent was wrong'd in, leaſt the fault ſhould be afterwards charged on himſelf. Fountainhall, 16th January 1684, Wilſon *contra* Foulis of Ratho.

IN an exhibition of writs, an advocate was obliged to depone as a witneſs, anent the defender's having the writs, tho' he was the defender's lawier in the cauſe. Durie, 14th November 1628, Betſon *contra* Ld. of Grange. — In an exhibition of writs, the advocate and agent in the cauſe were obliged to depone, their client being called, tho' it was argued, That a ſervant, factor, or perſon intruſted with the cuſtody of writs, ought not to be examined in prejudice of their conſtituent, unleſs it were as a witneſs. Stair, 1ſt February 1666, *contra* Rollocks.

locks. — In a declarator that a bond was merely in trust, the Lords ordained the defender's advocate to be examined as a witness, in so far as he knew the conveyance by information of other persons than his constituent; but refused to examine him on the information of his client, because an advocate is not obliged to discover his client's secrets. Fountainhall, 15th July 1680, Earl Northesk *contra* Cheyne. — The Lords found, That tho' advocates are not bound to discover the secrets of their clients concerning the point of right, they are obliged to depone in the expiscation of trusts, and private fraudulent conveyances. Marcus (*Advocates*) January 1684, Mr. James Keith *contra* Sir William Purves. — In the proof of a tenor, the defender's advocate being cited as a witness by the pursuer, the Lords ordained him to depone if he saw the writ in question, and what was the tenor of it, but would not put him to depone concerning any thing communicated to him by his client, further than what he might learn from sight of the writ itself. Stair, Gosford, 21st December 1675, creditors of Wamfray *contra* lady Wamfray. — In the process, Scot *contra* Lord Napier, it having been found, that my Lord was not obliged to depone and exhibite, unless upon a special condescendance of the writs called for; they next found there can be no interrogatories put to his lawiers and agents, as to writs come to their knowledge in the course of their imployment for him or his predecessors, but such as are competent to be put to the Lord Napier himself. 10th February 1737, Scot *contra* Lord Napier.

ADVOCATES and writers being summoned by an incident, as havers of writs; the Lords found, that they might purge themselves by oath, that they had them not, nor had fraudulently put them away, and that no other kind of probation can be used against them. Auchinleck, 16th December 1627, Kirkwood *contra* Inglis. — An advocate having granted a receipt of writs, at the foot of an inventory thereof, containing an obligation to produce them upon demand, to a person not in a publick office, not being holograph, nor having writer's name and witnesses; the Lords found the granter no further liable for these papers, than to give his oath what he knew concerning them, what became of them, and how they were disposed of. Forbes, 19th February 1713, Blair of That-Ilk *contra* Cunningham.

ADVOCATION.

THE Lords ordered, that, for the future, the Ordinary upon the bills may refuse to pass advocations, if he find cause, but that he ought to pass none without reporting them to the Lords. Dirleton, 8th June 1675, *contra*.

ADVOCATION cannot be past of sums within 200 merks, upon any reason of iniquity. Dirleton, 8th June 1675, Kyle *contra* Gray.

AN Advocation cannot be received after sentence tho' before extract, because *sententia definitiva est ultimus actus judicis*, and the extract is but the clerk's part. Stair, Ld. Lammerton *contra* Home of Kaims,

10th

10th July 1662. ——— A decret being pronounced before an inferior court, and the defender upon his application being allowed a time to give in his defences, extract being superseded in the mean time, and the defender having taken this opportunity to steal out an advocation; the Lords found the same irregular, and remitted the cause. Fountainhall, 24th March 1686, Mien *contra* M^cNiel.

AN advocation being produced to the inferior court, after the judge had pronounced the decerniture, but before he dictated the sentence to the clerk, and before he was *functus*, by expressing the special tenor of the decret; the decret following thereon, was found null, yet was sustained as a libel. Stair, Dirleton, 12th December 1676, Holmes *contra* Marshall.

THE Lords found no *spretum mandatum* where the inferior judge had proceeded, tho' the advocation was intimate to him, the intimation being made, not when he was sitting in judgment, but only at his dwelling-house. Spotiswood (*Advocation*) 18th July 1627, Mr. Gavin Stewart, minister, *contra* his parishoners. Durie, observes it thus, A decret of an inferior court sustained, tho' pronounced after letters and summons of advocation of the cause, execute against the party obtainer of the decret, because, not execute against the judge, who therefore could not be said to have acted *contra mandatum* in giving decret, tho' it was alleged the party was in *mala fide* to take decret thereafter.

A DECRET found null, *etiam ope exceptionis*, because led *post inhibitionem judicis*, or after advocation. Hope (*Advocation*) 18th July 1613, Cranston *contra* Home. ——— A decret of an inferior judge after he was discharged by an advocation, was found null, altho' the presenter, after using of the said advocation, had compeared in many diets of process, after production of the advocation, and before sentence. Haddington, 24th February 1607, Ld. Lathoquhar *contra* Lord Oliphant.

A PARTY having proceeded to obtain decret before an inferior court, after the clerk had subscribed a signature upon the margin of an advocation, bearing, that it was produced and admitted; the Lords found this to be a contempt of their authority; and this without finding it necessary for the raiser of the advocation to prove otherwise, than by the said subscribed signature, that the process was truly depending before the inferior court, Forbes, 26th June 1706, Mullikins supplicant *contra* Sharp of Hoddam and Coupland.

A SERVICE being advocated from an inferior judge to the maters, all other judges were thereby found prohibited to serve; tho' only mention was made of that one in the advocation, and such a retour was found null by way of exception. Durie, 18th July 1623 Cranston *contra* Home.

IN a process of adherence, the commissaries having admitted, *cum nota*, the nearest relatives of the pursuer, for proving the marriage; the Lords advocated the cause only *quoad* that point, but allowed them to go on as to other parts of the process, that being the single point complained of; which way of advocating, the author says, is somewhat extraordinary. Fountainhall, 11th July 1704, Stirling *contra* Grange Hamilton.

AN action pursued by the sheriff, for cutting his ground, before his own baillie, advocate to the Lords conform to the act of parliament, Queen Mary, parliament 6. *Cap.* 39. Haddington, November 1611, Ld. Sanquhar *contra* Creichton.

ART and PART.

ONE found liable in a spulzie of tiends who was not concerned in the act of spoiliation, upon its being proven, that the corns were thereafter cast into his barns, threshed there, and disposed of by him. Durie, 26th January 1628, Earl of Roxburgh *contra* Ld. Langton.—Goods spulzied being conveyed by the spulzier directly to his friend's house, this receipt was found sufficient to make the owner of the house partaker of the spulzie, Haddington, 2d December 1609, *contra* Ld. Cowgrane.

ALIMENT.

And first, of the act 1491. *Cap.* 25. anent alimentering of heirs.

The heir has a claim in his own right without a service. THE action for aliment is competent to the apparent heir *qua* such, and therefore requires not a service. Durie, 12th February 1635, Hepburn *contra* Seaton.

Who entitled to an aliment. LANDS falling in the superior's hand by ward, and the vassal's relict not being provided, the superior was found obliged to give her such an aliment during the ward, as should be modified by the Lords. Balfour, 21st July 1534, Janet Logan *contra* Elisabeth Campbel and William Wallace.

Heir renouncing, not entitled. IN a process of aliment, at the instance of one who had renounced to be heir to his predecessor, and possessed by virtue of singular titles against the Lady liferentrix, who was only relict of his granduncle; the Lords found her not liable in any aliment, because of his bruiking by special singular titles, and having renounced to be heir. Forbes, 16th, Fountainhall, 18th January 1712, Lyon of Brighton *contra* Lady Carse. — But in a pursuit against an heir, renouncing at the liferentrix's instance, for a certain sum, in name of aliment furnished to him by her; the Lords assailed, in regard she was bound to aliment the heir, and the aliment was bestowed before the heir's renunciation. Stair, Dirleton, 16th July 1667, Hamilton *contra* Symington.

Or if the estate be sold, A FIAR has no longer title to an aliment upon the act of parliament, after he has sold the lands. Fountainhall, 27th January 1700, Sandilands *contra* his mother.

THE

THE modification of an aliment was refused to a vassal of ward lands, because he had rents besides these, and the superior was only found bound to pay proportionally, to supply the defect of the aliment. No aliment, if the heir has other funds. Haddington, 16th March 1622, Heir of Milntoun *contra* Calderwood. Balfour, 1st December 1534, Buchannan *contra* Stewart. ---- Found, that the heir ought to have a modification of the wardatars and liferenters, altho' he had lands and rents of his own the time of his father's decease, because they were since comprised for his father's debts. Hope: (Heir) 1619, Whitefoord *contra* Calderwood. ---- In an action at the instance of the apparent heir against a liferenter for aliment; the Lords considered the estate as it was at the defender's husband's death, when her liferent began; so that if the estate was not then exhausted by liferents or debts, they found no aliment due. Falconer, Home, 7th February 1682, Hamilton *contra* Hamilton.

A SON who was fiar, found entitled to an aliment from his mother liferentrix, she being married again, tho' he had been bound apprentice to a skipper, was eighteen years old, and had deserted his service, nor had she any more, but 600 Merks yearly. Fountainhall, 4th June 1687, Ramsay *contra* Rigg. ---- The Lords modified an aliment to an heir out of his stepmother's jointure, tho' he was neither minor nor without a calling, being an advocate, but this employment afforded him no subsistence; and this, altho' he was, at the same time, impugning her jointure in another process, as exorbitant, besides, that he was served heir *cum beneficio*, and none of his father's debts were real, or at present effecting the estate; and here the Lords made the aliment payable in money, tho' the jointure was paid in victual. Fountainhall, 25th July 1705, Mr. William Ayton *contra* Dame Magaret Colvil. ---- An aliment to the apparent heir, pursued against the liferentrix was not sustain'd, in regard the liferent was mean, and the apparent heir was major, kept a brewery, and was not *frugi, aut bonæ famæ*, and the liferentrix kept one of his children. Stair, Gosford, 27th January 1669, Stirling *contra* Heriot. ---- Aliment was refused to an apparent heir, upon the following grounds, *viz.* That the sum liferented by the relict of his brother, was but small, and no more than the annualrent of her tocher. *2do.* That the pursuer was forty years old, and therefore either had, or ought to have a trade, and that in the summons he designed himself Preacher of GOD's word. Durie, 11th February 1636, Sibbald *contra* Wallace. ---- In a similar case, the same was refused, where the brother's relict, and the defunct's and pursuer's father liferented all betwixt them, the relict liferenting but ten chalders of victual for 8000 merks she brought in tocher, and the pursuer being at perfect age, and bred a writer. Durie, Spotiswood, (Heir) 21st July 1636, Ld. Ramorney *contra* Law. What if he has an employment.

THIS act comprehends conjunct fiars and liferenters, as well as donatars of ward. Stair, 12th December 1677, Preston *contra* liferenters of Ardrie. ---- This act does not extend to a father liferenter by reservation, &c. Durie, 21st July 1636, Ld. Ramorney *contra* Law. ---- A grandfather being liferenter by reservation, was found not obliged to aliment his grandson, who was left to his recourse upon his mother. Durie, 7th July 1629, Hamilton younger of Blair *contra* his Who bound to aliment.

his grandfather. Stair, 26th February 1675, Whitefoord *contra* Lammington. ----- The grandfather who had a liferent by reservation, was found liable to aliment the apparent heir, the mother having no liferent, but of a sum of money which came by herself. Stair, 27th June 1662, Ruthven *contra* Ld. Gairn. ----- The heir's aliment was found to be a burden upon his mother, and not upon the grandfather, tho' he enjoyed the liferent of the whole estate by reservation, save an annuity of 1000 Merks, provided to his daughter in law, the pursuer's mother.

January 1729, Hay younger of Park *contra* his grandfather and mother. ----- The Lords modified an aliment for a pupil, out of his mother's liferent lands, altho' they were burgage lands, and not holding ward. Auchinleck (*Tutor*) 13th February 1631, Finny *contra* O-liphant. ----- The estate of Lovat was settled in liferent to Fraserdale, and in fee to his son; Fraserdale having forfeited his liferent escheat, the Lords found the donatar liable to aliment the fiar, who had no separate estate for his subsistence. February 1722, Hugh master of Lovat *contra* captain Simeon Fraser. ----- A man who had been declared an idiot by the Lords, and, as such, had gotten a tutor dative given him in exchequer, being pursued by his niece, an infant, and his apparent heir, for an aliment, on this head, that, being in such a condition, he was no better than a liferenter, and all such are bound to aliment the fiar who has not *aliunde*, as in this case. The Lords thought the demand altogether new, and without law or precedent; and that the circumstance of his fatuity did not alter the case, for he might reconalesce; and this might be as well craved, if the fiar were an infant, who could be maintain'd on a small expence; and therefore found no ground for modifying an aliment in this case. Fountainhall, 15th February 1709, Bonner *contra* Bonner. ----- One having dispon'd his lands in favour of his wife, her heirs and assignies, with this *proviso*, That after her death a certain portion thereof should accresce and belong to his nephew; the nephew's daughter and only child, after her father's decease, intented action against the wife for aliment, as apparent heir to her father and granduncle. The defence was, That there was no relation betwixt the pursuer and defender, and therefore no aliment due, *super jure naturæ*. 2do, The defender liferents no lands to which the pursuer can succeed as fiar. 3tio, The pursuer's father was denuded of this claim in his own lifetime, having dispon'd the same to his creditors for their security and payment, and to his wife whatever should remain. The pursuer was not found intitled to an aliment. 24th January 1729, Laing *contra* Kay. ----- Our custom has extended this obligation of aliment no farther than to heirs of land-estates, in the view of supporting antient families. A relict therefore who liferented her husband's whole stock, consisting in money, was not found obliged to aliment her children, to whom the fee was provided. July 1731, Mirry *contra* Pollocks.

Benefit of discussion among those bound to aliment.

Two liferenters upon an estate, *viz.* the mother and grandmother, were found to aliment the heir *pro rata* off their liferents. Stair, 12th December 1677, Preston *contra* liferenters of Airdrie. Fountainhall, 20th February 1697, Seaton *contra* Turnbull. ----- In a pursuit at the instance of an apparent heir for aliment, against his mother and grandmother, liferentrixes upon his estate, the grandmother was affoizied, because

because she had formerly given down to her son, the pursuer's father, more of her liferent provision than the Lords would have decerned to this pursuer, had her provision remained with her entire. 12th July 1729, Lady Anne Allardice *contra* Mary Mill, relict of James Allardice of That-Ilk.----- The contrary. Falconer, 27th November 1685, heir of Kirkland *contra* his grandmother.----- But in a like case this defence was not sustain'd for the grandmother, that she had a separate estate, *viz.* a liferent from a former husband, the half of which she voluntarily sold for payment of the debts of her husband, the pursuer's grandfather. Bruce, 12th July 1715, Cunningham *contra* Ramsay.

A CHILD and his tutor pursuing his mother, the liferentrix of his lands, and her second husband for an aliment; the Lords refused to admit her offer to keep and entertain him herself; and ordain'd the pupil to remain with the tutor, and sustain'd the action for aliment. Durie, 14th July 1627, Noble *contra* Noble. Durie, 22d February 1631, Finnie *contra* Oliphant.---- The like, Stair, 19th February 1679, Sibbald *contra* Falconer.----- An offer to aliment in family not sufficient to elide the claim. Falconer, 27th November 1685, heir of Kirkland *contra* his grandmother.

An offer to aliment in family not relevant.

A DONATAR of ward found liable to aliment the heir, whether he intromitted or not with the mails and duties, unless he instructed how he was barred. Stair, 19th February 1679, Sibbald *contra* Falconer.

Donatar of ward liable, tho' he has not intromitted.

AN affigney to a gift of ward found liable to aliment the heir. Stair, 19th February 1679, Sibbald *contra* Falconer.---A fiar pursuing his mother the liferentrix for an aliment whose liferent, tho' considerable at first, was now diminished by her debts, &c. and the fiar contending that it should be considered, not as now it was, but as her husband transmitted it to her; the Lords found her creditors, or singular successors for onerous causes, no ways liable nor affectable for any part of the liferent they had; and that the aliment was not real against them, nor the liferented lands, (tho' 'tis otherwise as to the aliment of ward minors) nor that her son had any regrefs against her upon her warrandice from her fact and deed for diminishing the jointure, being done long before his intenting his action of aliment, and so that the jointure must be considered as it now stands, and not as it was in the beginning; and finding it very mean, they refused to modify any thing out of it to her son. Fountainhall, 14th July 1699, Ogilvie of Linksfield *contra* Gordon his mother.

If claim for aliment is good against affig-nies.

OF 1000 merks, which was the mother's yearly annuity, L. 100 was modified to the apparent heir. 29th January 1729, Hay younger of Park *contra* his mother.----- In the like case the Lords modified L. 100 out of 600 merks a year. Fountainhall, 4th June 1687, Ramsay *contra* Rigg.

Modification of the aliment.

Aliment due *ex debito naturali*.

THE Lords decerned an aliment to an apparent heir, in proportion to his father's estate, and refused to sustain the father's offer of aliment-

Father liable to aliment his children.

ting him in his family, in respect of the notoriety of his maltreatment. 19th July 1716, William Morison younger of Prestongrange *contra* his father. ----- An *interim* aliment decerned to an apparent heir of an entail'd estate against his father, married to a second wife, and who had given some ground of complaint for maltreatment, tho' at the same time he was much incumber'd with debt. 30th July 1734, Hepburn younger of Humbie *contra* his father. ----- The question being, Whether a father, being himself indigent, and having a great family of small children, should be obliged to aliment his eldest son, having been educated in a trade : The Lords considering the great portion the pursuer's mother brought, and that he was a person of no ability to aliment himself by his industry, decerned the father to receive him in his house, or else, at his option, to give him 200 merks. Stair, 13th January 1666, Dick *contra* Dick. ----- A father, being furious or an idiot, and liferenting the whole Estate; the Lords, with respect to his children, found this difference betwixt him and other fathers, that they decerned an aliment to his children out of his liferent (they not having *aliunde*) tho' he had educated them till they were of age, and could do for themselves, and were also married. Gosford, 10th December 1672, Carstairs and her husband *contra* John Carstairs. ----- The Lords found a father, who, by threats, forced his daughters to serve others, when he was in a condition to maintain them in his family, liable to pay them a competent aliment, tho' they were in service. Marcus (*Aliment*) July 1687, Cairns *contra* Bellamore their father.

Mother liable. THE mother is obliged to aliment her children *jure naturæ*, but it is sufficient that she aliment them in her family; and it was found, that they could demand no aliment or modification *extra familiam*, even tho' it was alledged, that it was unsafe to trust the children to their mother's breeding, seeing she had miscarried, and, being a woman of quality, had married a deposed minister. Stair, 23d February 1666, children of the Earl of Buchan *contra* lady Buchan.

Heir liable to aliment his brothers and sisters. AN heir succeeding to a competent estate, as heir to his father, was found liable to aliment his brothers and sisters, being wholly unprovided. Stair, 24th January 1663, children of Netherlie *contra* the heir. ----- The like, Stair, 10th November 1671, Hasty *contra* Hasty. Bruce, 23d July 1715, children of Knapperny *contra* their elder brother. ----- In a suspension of a bond granted to a craftsman by an eldest brother, for a younger brother's apprentice-fee, upon minority and lesion, the Lords found, That the younger brother, having no other means nor provision, his eldest brother, who was heir to his father, and had the estate, ought to entertain him, and to put him to a calling; and refused to sustain the reason of lesion. Dirleton, Newbyth, 5th July 1676, Chiesly *contra* Edgar. ----- The Lords found a minor liable for an account of mournings, taken off by him for himself, and brother and sisters. Forbes, 14th July 1705, M'Dowal *contra* Marshall. ----- In a process at the instance of the younger children against their elder brother, who had an opulent fortune from his father, and they unprovided, craving an aliment, the Lords allowed a competent aliment yearly to each of them the boys till 14, and the girls till 12 years old. Fountainhall, 13th January 1697 children of Attenburn *contra* their brother. ----- A sister succeeding to the means of her father and mother was,

was found liable for the expences bestow'd in alimentering her furious brother, but that only in so far as she was *lucrata*, by being freed from entertaining the furious person in her own family. Stair, Fountainhall, 23d July 1678, Thomson *contra* Wilkie.---- The younger children of a family, who were all unprovided, applied to the Lords for an aliment till majority, which accordingly was granted, but the question being who should uplift and discharge, they having no tutors, and the aliment small; and here it being concerted among the friends to divide the children among them, so that each of them should take a child, and to discharge the heir upon payment of their several proportions, and to give bond to apply it for their aliment and education, and to hold compt for the same at their respective majorities. To this the Lords condescended, and declared that their discharge should be a sufficient exoneration to the heir and his tutors. Fountainhall, 2d February 1711, Somervells *contra* Ld. Drum.----- During the dependance of a process of reduction of a father's testament, betwixt a sister, pursuer, and a brother, defender, who was both heir and executor, she craving an *interim* aliment, *ex jure naturæ*; the Lords found, That she being married, could crave no aliment from her brother. Fountainhall, 23d February 1711, Maxwell and her husband *contra* Sir Alexander Maxwell.

A BOND of provision being granted to a daughter, payable at a certain time, the heir was found liable to aliment her in the *interim*. Stair, 8th January 1663, Lady Otter *contra* Ld. of Otter.---- The like, Stair, 11th February 1663, Frazer *contra* Frazer.----- The like, Stair, 5th July 1677, children of the Ld. of Lauriston *contra* Lauriston. Stair, 21st January 1679, Straitons *contra* Ld. Lauriston.

A FATHER granted a bond of provision to his daughter, payable at her age of 17 years, with an obligation to entertain her in the mean time, but no obligation of annualrent: Some years after her age of 17, she insisted against the representatives of her father, for aliment from her father's death, till the time her bond was payable, and for annualrent thereafter; the Lords found aliment due after the term of her bond, as well as before, but no annualrent: Stair, Dirleton, 21st January 1668, Stewart *contra* Ld. of Rosyth.

A MOTHER pursuing the heir for an aliment to her daughter, an infant, the heir's sister, whose portion was not payable till her age of 15; the Lords modified the third part of the annualrent of her portion for aliment, till she should be seven years old, and half of the annualrent from that till ten, and two thirds of her annualrent from ten till her age of fifteen, which was the term of payment. *Nota*, This, as the author says, is the common rule of modification in all cases, when respect is had to a child's bond of provision. Fountainhall, 8th February 1678, Cleland and Geddes *contra* Geddes.

A PERSON being reduced to extreme want and misery, by providing his eldest son to the gross of his estate, and thereafter disposing the remainder to his second son, to get good matches to them, the Lords, upon the father's application, modified an aliment to be paid to him by the said two sons, *pro rata* of what they got from him. Forbes, 20th July 1710, Brown of Thornydikes *contra* his sons.

Children
bound to ali-
ment their pa-
rents.

Aliment by Paction.

IN a contract of marriage, the husband became bound to pay to an only daughter the sum of 6000 merks at her age of 16, *and in the mean time to maintain her in bed, board, schools, cloaths, and all other necessaries*. In a ranking of the man's creditors, wherein the daughter appeared with an adjudication upon this claim of aliment, it was pled for them, That this stipulation to aliment, is no more but exegetic of the natural obligation, and must cease, when the father is no longer in a capacity to aliment himself. The Lords found, That a paction to aliment, tho' constitute by a contract of marriage, cannot compete with the onerous debts of the father, he becoming bankrupt. 13th February 1736, Margaret Falconer *contra* creditors.

A WIDOW, who liferented her daughter's portion of 12000 merks, entring into a second marriage, took an obligation in the contract from her future spouse, to educate and aliment her daughter suitably. In a process at the daughter's instance, after her majority, for a liquid sum in place of aliment, the Lords decerned for 300 merks a year; and found it not a sufficient implement of the obligation, that the defender offered to aliment her in his own house with her mother, as was done for bygone years. 27th January 1736, Henrietta Moncrief *contra* Fairholm of Pilton.

HUSBAND must aliment his wife. See Husband and Wife.

ALIMENTING of prisoners. See Prisoner.

ALIMENT when presum'd gifted. See Presumption.

ALIMENT if attachable by creditors. See Personal and Transmissible.

ALTERNATIVE.

A MAN giving bond to pay a sum at a term, and, in case of failzie, to infest the creditor in certain lands; this is no alternative, so as to give the election to the debtor, these clauses being introduced in favours of creditors, so that this is an exception from the rule. Durie, 5th July 1623, Brown *contra* Wright.

A CHAMBERLAIN having given bond to his master, with this alternative, either to constitute bygone rests against the tenants, or pay the debt himself, but without saying, *betwixt and such a day*; the Lords, in a pursuit for the sum, at the master's instance, repelled the chamberlain's defence, That now he had recovered decret against the tenants, and was willing to assign; but decerned *simpliciter* against him, in

in regard he had done nothing against the tenants for three years, because, there being no day set down in the ticket, he was *instante debitor*, and the rather because of his long silence; but superseded execution from July till November, that in the mean time he might operate his payment from the tenants. Newbyth, 8th July 1665. Earl Rothes *contra* Leslie.

ONE having a tack of tiends, assign'd the heritor to the tack of his own tiends, "obliging himself to procure new tacks at the expiration of the former, or to refund the money then paid for the assignation. This was found not to be an alternative obligation, but that the granter must grant a new tack, if it was in his power; and if not, that the refunding of the price, was *loco damni in facto imprestabili*. Gosford, 22d July 1673, Nisbet *contra* Lord Balmerino.

A PARTY having been decerned by an inferior judge, to deliver to the other some writs in his hands, or else pay a sum, the election here being the debtor's, and yet he never having been charged on the decret, before he was poinded for the liquid sum, the Lords found the poinding unlawful, and decerned Restitution of the goods, and the prices to be modified by their Lordships, and also for payment of the expences, damages, &c. Durie, 25th July 1638, Brown *contra* Blackburn.

A FATHER having granted a bond of provision to his daughters, obliging himself to pay the sum at their ages of 15 years, or at their marriage, they marrying with consent of himself, and certain other persons named; it was pled for the children, in a process for payment against their brother, the heir, That the bond was purify'd by their arriving to 15 years, and payable sooner, in case they had been sooner married, the Lords found the clause suspensive of payment, till it appear how the children would marry. Stair, 21st January 1679, Straitons *contra* Ld. Lauriston.

A N N A T.

THE annat found to extend only to half a year more than the defunct had right to *proprio jure*. Stair, 26th July 1661, Ker *contra* parishioners of Cardine. Found formerly to extend to a whole year. Durie, 16th June 1629, Smeiton *contra* the relict of the minister of St. Bothans. ——— And afterwards, Gilmour, July 1662, Weemy's *contra* parishioners. See act 13, parliament 1672.

THE annat extends to the profit of the glebe, if there be no new in-trant. Stair, 19th July 1664, Scrimzeor *contra* executors of Murray. ——— Otherwise the glebe falls not under the annat, except the crop thereof, if it was sown before the minister's death. Stair, 6th July 1665, Colvil *contra* Lord Balmerino.

ANNAT divides betwixt the wife and nearest of kin, where there are no bairns. Stair, 24th June 1663, Scrimzeor *contra* Murrays. Stair, 22d January 1679, Spence and Clark *contra* Craig. Belongs to the nearest of kin, there being no wife or children of the defunct. Stair, Newbyth, 6th July 1665, Colvil *contra* Lord Balmerino.

IN a question, whether the annat (whereof the terms of payment are determined by the act of parliament 1672) be due to the relict and children of a stipendiary minister of a burgh, whereof the stipend is paid by a contribution, there being no tithes out of which it can be paid; tho' 'tis commonly look'd upon as a *debitum fructuum* only, yet the Lords found all stipendiary ministers included in the act, whether paid in money or victual, and therefore found an annat due here. Fountainhall, Forbes, 8th February 1709, Shiel's representatives *contra* town of St. Andrews.

A MINISTER who had fifters, having assign'd his annat to his brother's son, the Lords found that it belonged to his nearest of kin, *proprio jure*, and not to his assigney. Fountainhall, Marcus, (*Ministers*) 18th March 1686, Alexander *contra* Cunningham. — Whether it can be evicted for the minister's debts. See Durie, 9th December 1623, colonel Henderson's bairns *contra* debtors. Durie, 28th February 1628, bairns of bishop of Galloway. — The annat is a legal gratuity in favours of the wife, children, or nearest of kin, that cannot be burdened with the defunct minister's debts, not being *in bonis defuncti*. Fountainhall, 20th February 1694, Donaldson *contra* Brown.

THE annat being indulged by the law to the wife, bairns, and nearest of kin of the defunct minister, and originally their right needs no confirmation. Stair, 26th July 1661, Ker *contra* parishioners of Cardine, Stair, 16th July 1673, Ker *contra* parishioners of Morumside.

ANNUALRENT.

Due ex lege.

ANNUALRENT due upon inland bills, as well as others, in respect that the act 36, parliament 1696 extends the statute 1681, to inland bills and precepts in all points. Forbes, 8th, Fountainhall, 28th June 1705, Blair *contra* Oliphant of Langtoun.

A BILL of exchange bears annualrent against the acceptor from the term of payment stipulate in the bill, tho' not protested for not payment. Home, 14th November 1718, Baynton and Shaw *contra* Swinton. — Formerly otherwise decided, Forbes, 15th July 1713, Watson *contra* Gordon.

Due

Due ex pacto.

ANNUALRENT once paid, implies a paction to continue payment of the same. Gosford, 15th January 1675, Cathcart *contra* Row. Dirleton, 20th December 1676, Carnegy *contra* Durham. Spotifwood, (*Usury*) Durie, 4th March 1628, Forrester *contra* Clark. Gosford, 15th, Stair, 17th November 1671, Hepburn *contra* Ld. of Congleton.

ANNUALRENT stipulate for one term, found ever due till payment. Gosford, 13th January 1669, Earl of Winton *contra* Seaton. Dirleton, Gosford, 20th December 1676, Carnegy *contra* Durham. Durie, 2d December 1628, Zair *contra* Ramsay. --- A debtor, by a missive letter, having obliged himself to pay annualrent for the time bygone, annualrent was found due also *in futurum*. Stair, 13th January 1669, Home *contra* Seaton. --- A contract of marriage, bearing only an obligation to pay the sum at a certain term, with one term's annualrent, annualrent was decerned for all terms bygone, since the date of the contract, in respect it was for tocher. Spotifwood, (*Usury*) 16th February 1629, Keith *contra* Bruce. --- In a bond of provision, the term at which annualrent should commence not being fixed, but left open, as the father should afterwards determine, and he having died without fixing the same, it was found, That the children being alimented during the lives of their father and mother, annualrent could only begin to run after the death of both, and not from the father's death. Fountainhall, 17th July 1696, Nairne *contra* Lindsay. --- A party having given ticket for a sum, payable at a precise day, and if not then paid, obliging himself to grant bond for it, bearing annualrent; the Lords, altho' the creditor, after elapsing of the day, did not require any such bond, yet found annualrent due. Fountainhall, 27th February 1702, Houston *contra* Shaw. --- A legacy payable to one, in case he should demand it within seven years after the testator's death, and, upon his failing to require it in due time, payable to another, with annualrent during the not-payment, having accrued to the substitute, through the institute's neglect to call for it within the limited time, he was by the Lords found to have right to the annualrent for the same from the testator's death. Forbes, 12th July 1711, Nielsons *contra* Coulter and Wilson.

A PARTY by a reserved faculty in his contract of marriage, being allowed to provide a second wife and her children in a certain sum, without any mention of annualrents, the sum was found to bear interest from the first term, after dissolution of the second marriage by the man's death, for the relict's use; for this was implied in the reserved faculty, by which the liferent was designed only for the wife, and the fee for the children. Fountainhall, 12th July 1699, Ld. of Kinfawns *contra* his stepmother. --- One in his contract of marriage bound himself, to provide a certain sum to himself and spouse in conjuncture and liferent, and to the heirs of the marriage; but in case of his predeceasing without heirs of the marriage, his spouse was to have power to dispose of the foresaid sum: This event happened, and the

question occurred, Whether the sum bore annualrent ? which would entitle her second husband to the *jus mariti* only : No annualrent was stipulated in the contract ; but it was argued, That the provision of liferent, was virtually a stipulation for annualrent : The Lords found the sum heritable, and fell not under the *jus mariti* of the second husband. 16th June 1733, Millar *contra* Sinclair and Murray.

GEORGE having borrowed 8000 Merks from Peter his brother, gave a wadset therefore ; George being an old man, without hope of children, the reversion was granted to him only, and to the heirs of his body, and his liferent of the wadset was reserved without mention of any back tack-duty or annualrent ; in a reduction of the wadset, Peter alleged, That, albeit the wadset bore no annualrent, yet, he having lent his money in hope of succession, and his brother having now married a young wife, he ought not to take advantage of him, seeing the annualrent is due in equity for the profit of the money ; it was found, That annualrent could not be due in this case, unless it had been so pactioned and agreed. Stair, 11th December 1662, Logie *contra* Logie.

A PUPIL's stepfather, giving bond to the tutors to be countable for his wife's intromissions ; this was found to import also payment of the annualrent thereof, tho' no mention of annualrent was made in the bond. Auchinleck (*Tutor*) 17th July 1636, Tutors of Vallange *contra* Dr. Forrester.

Due ex mora.

DENOUNCIATION makes the sum bear annualrent, tho' the horning be not registred. Stair, 11th February 1673, Smith *contra* Wauch. And yet escheat falls not but upon registration. — Denunciation at the market cross of Edinburgh, where the debtor dwells not, tho' sufficient for caption, yet not for annualrent. Stair, 26th January 1665, Hutchison *contra* Dickson. Fountainhall, Forbes, 17th July 1711, Gordon *contra* Gordon. November 1733, Dunbar of Burgie *contra* creditors of Castlehill. — The contrary was found. Fountainhall, 17th December 1686, *contra* . And the reason given, is the debtor's contumacy, which still takes place when ever he is denounced.

A CHARGE and denunciation having passed upon a decret, which was thereafter suspended, and restricted to a lesser sum ; annualrent was, notwithstanding, found due of the restricted sum, denunciation having passed. Stair, 30th January 1663, Rigg of Carberry *contra* his creditors. — An executor found not liable in any annualrent due by the defunct, the time of his decease due upon denunciation, without paction. Auchinleck (*Intromission*) Douglass *contra* Fraser. — But the heir found liable. Durie, 8th July 1642, Huntly *contra* Manson.

Due

Due by Tutors and Curators.

TUTORS and curators, have a year after admission to uplift and reemploy the minor's sums not bearing annualrent, after which they are liable for annualrent. Stair, 9th July 1667, Steven *contra* Boyd. ——— And therefore, must uplift and imploy annualrents due before the tutory, within a year after acceptance. Stair, 27th February, 1673; Douglass *contra* Gray. Fountainhall, 16th January 1696, Irvine and Oliphant *contra* Spence. ——— As to mails and duties of lands and other rents, tutors and curators are accountable for the annualrent thereof within a year after they are payable; this *laxamentum temporis* is allowed to find hands for lending out their pupils money. Fountainhall, 20th November 1678, Hay of Drummelzier *contra* Earl of Tweeddale. Fountainhall, 16th January 1696, Irvine and Oliphant *contra* Spence. ——— The like as to the annualrent of goods roused, *durante tutela*. Fountainhall, 29th November 1683, Wilson *contra* Foulis. ——— But as for annualrent of sums falling due *pendente tutela*, they are not to be accumulated into a principal sum, to bear interest, but once during the tutory; so that tutors are only accountable for the *usura usufructuaria* of such, *post finitam tutelam*. Stair, 27th January 1665, Kintore *contra* Boyd. Fountainhall, 20th November 1678, Hay of Drummelzier *contra* Earl of Tweeddale. Fountainhall, Falconer, 18th March 1684, Lockheart *contra* Ellies. Observed by Sir Patrick Home, December 1682. Fountainhall, 16th January 1696, Irvine and Oliphant *contra* Spence. ——— The Lords found a tutor must pay annualrent for victual-rent and house-mails, within a year after they are due, and made no difference betwixt country-rents, and town-rents, tho' the cash is sooner got in; and fand him not liable for the annualrent of annualrent of sums of money, till after the expiring of the tutory, for which there is no equity, but mere custom. Fountainhall, 2d December 1679, Hamilton *contra* Veitch. ——— But a tutor was freed from this obligation, having died two years before expiration of the tutory, in which time, he might have both uplifted the annualrents and reemployed them. Stair, 4th July 1665, Kintore *contra* Boyd. ——— The Lords found this difference betwixt tutory and curatory, with respect to annualrent of the minor's annualrents, *viz.* That altho' tutors *semel in tutela*, must imploy what is over the pupil's aliment upon annualrent, and so leave it bearing annualrent; yet, that a curator was not at all obliged to this, because *fnita tutela*, the minor continues still weak, and may neglect to call the tutor to an account of his administration, whereas *fnita cura*, the minor is *sciens & prudens*, and may immediately convene the curator. Home, November 1686, Inglis and Charters *contra* M'Morran. Fountainhall, 10th July 1688, Wilson *contra* Foulis.

A TUTOR found liable for the annualrent of his pupil's money uplifted by him, whether heritable or moveable, not only till the expiration of his office, but till the real payment, even after he had intended an action *contraria tutela*, in order to have his accompts cleared, and to pay his balance. Durie, 18th March 1628, Naimith *contra* Naimith.

A TUTOR uplifting some of his pupil's money, and dying soon thereafter, before he had opportunity to lay it out upon interest; his heir, an infant at the time of intromission, was found liable only for the annualrents after intenting the cause, the pursuer having been silent twenty five years. Durie, 22d February 1634, Davidson *contra* Jack. ——— Otherwise, where the tutor uplifted a sum bearing interest, and gave his bond to make the same furthcoming to his pupil; for if he took the money in loan, he was liable for interest; and if it once bore interest in his person, it could never cease in the person of his heir, tho' a minor. Durie, Spotiswood, (*Tutor*) 24th February 1627, Guthrie *contra* Guthrie. ——— A tutor is neither obliged to uplift the annualrents of his pupil, nor give them out upon interest, the debtors being responsible, but only once betwixt and the end of the pupillarity, and if he die before that time, he is free; but if he did uplift any of the annualrents, his heir is liable for the annualrent thereof, not from the tutor's death, but from the end of the pupillarity. Stair, Gosford, 9th July 1669, Kintore *contra* the heirs of Logan of Coatfield. N. B. This was stopped to be further heard.

CURATORS receiving the minor's money two or three months after a term, it being consigned by the debtor at the term, and by occasion of dependence of the process, not given up till after the space foresaid, were not made to account for that term's profit, unless it could be verified, that they had imployed the money, and received profit for it the same term. Durie, 1st March 1627, Guthrie *contra* Guthrie.

A TUTOR who was cautioner for a sum payable to his pupil, at the principal debtor's death, being pursued for the same by the minor and her curators, after the tutory expired, was found liable for annualrent after the term of payment, altho' the bond bore none, because of his negligence, in not making due payment, altho', because of the principal parties insolvency, he could have no relief, nor was ever interpellated, but the Lords found, That from the expiration of the tutory, till the time he was charged by the minor, he was not liable in annualrents. Hope (*Tutor*) Durie, 1st July 1625, Goldman *contra* Goldman.

THE Lords found a protutor liable in the annualrents of money intromitted with by him, as a tutor would have been. Durie, 5th July 1737, M' Duff *contra* M' Duff. Durie, 17th July, Spotiswood, (*Tutor*) 21st July, Auchinleck (*Tutor*) July 1630, Vallanges *contra* their mother.

Due by Factors.

IN a process at the instance of creditors on a bankrupt estate against the factor, wherein they craved, That he might be liable for annualrent, within a year after the rents fell due, in the terms of the act of sederunt, ult. July 1690, the Lords found the factor liable in annualrent, conform to the said act, and so confirmed it by a decision; and this, tho' the fortune was small, and the creditors usually applied for warrands upon the factor for their annualrents, which he could not quickly answer

swer, unless he were allowed to keep money in his hands. Fountain-
hall, 1701, creditors of Carden *contra* Robertson.

Due by Consignatars.

ANNUALRENT being claimed from a consignatar, upon this *medium*, That it was consigned, not as a fungible, but as a *corpus*; and he had lent out the same, and got annualrent for it, & *accessorium sequitur principale*: Answered, The lending out the money was upon his own risque, and the party was not concerned in what shape he kept the money, provided he had it ready upon a call; the Lords found no annualrent due. Bruce's manuscript, 20th July 1716, Barclay *contra* Caruthers.—— Mr. Wallace of Inglisfoun, in the year 1713, sold lands to Sir James Dick, and certain incumberances remaining unpurged, 2000 merks of the price was consigned in Ballandallock's hands, who gave an obligment to the feller, declaring, *That the money was put in his hands to be expended, in perfecting and completing the rights and diligences affecting the purchase; and therefore, obliging himself to count to the feller for the said sum, and if any overplus remained, after completing the diligences, to pay the same on demand.* In the year 1728, Inglisfoun having raised a process against the present Ballandallock, for recovering the said sum consigned in his father's hands; the Lords found the defender liable for annualrent as well as principal. February 1728, Wallace *contra* Cunningham.

Due by Executors.

A STRANGER executor being pursued by the nearest of kin of the defunct, who were minors, for their share of the inventory given up by the defunct himself, the Lords found him liable to them from the date of the confirmation, for annualrent of sums therein set down as bearing annualrent, but not for annualrent of other sums which were not expressed to bear annualrent, tho' it was alledged, that *nummi pupillares non debent esse otiosi, &c.* Forbes, 26th June 1705, Robertson *contra* commissary Baillie.—— AN executor-creditor having confirmed and uplifted sums not bearing annualrent, and having a balance in his hand, after payment of his own debt, which he laid out upon interest; he was found liable to account to the other creditors for the neat balance only, not the profits; because, an executor-creditor is not bound, like a tutor, to lay out upon interest the sums he uplifts, and if he does it, the risque is his own. July 1730, creditors of Thomson *contra* Monro.

Due by Trustees.

A DEBITOR having conveyed his effects to certain trustees, to be converted into money for the behoof of his creditors, the trustees, in counting with the creditors, were found not liable for annualrent of the sums, that, from time to time, came into their hands, during the course of their managment. 4th January 1738, trustees of Colonel Johnston's creditors *contra* the creditors.

Due by those who uplift sums bearing Annualrent.

A PARTY, having assigned his creditor to a greater sum, owing to himself by bond bearing annualrent, upon the creditor's obliging himself by back-bond to retrocede the cedent upon his paying the debt, in security whereof the assignation was granted, or to order the debtor in the sum assigned to pay him the superplus, in case the assignee got payment by the assignation; the Lords found the assignee, who uplifted the whole sum, liable to the cedent for the balance, and annualrent thereof from the term of his uplifting the money. Forbes, 22d December 1710, Irvine of Drum *contra* Gordon. ----- A factor upon a bankrupt estate, having a considerable sum of bygone rents in his hands, bearing interest, the two preferable creditors upon the estate, who had long disputed which of them was to be ranked first in order, apprehensive of the rents perishing, agreed to divide the same in a certain proportion; in consequence of this agreement, application was made to the court of session, in the name of one with consent of the other, and he accordingly uplifted the bygone rents out of the factor's hand; and being many years thereafter pursued by the other creditor upon the agreement, was obliged to repete the pursuer's proportion of the rents, with interest from the time of uplifting. 18th February 1736, Colonel Erskine *contra* Earl of Lauderdale.

Due by those who are *lucrati*, as having had the use of other people's money

MONEY being due as the price of land, bears interest from the time that the purchaser attains possession, tho' not stipulated in the contract, being *lucratus* by the rents of the land. Spotiswood (*Usury*) 7th February 1628, Home *contra* Ld. of Renton. ----- And this tho' the money was arrested in the purchaser's hands, so that he was not in *culpa* or *mora*. Durie, 17th February 1624, Ld. of Durie *contra* Lord Ramsay. ----- The like, tho' the seller was in *mora*, that the price was not paid, not having delivered a sufficient progress. Stair, 28th January 1663, Ld. Balnagowan *contra* M' Kenzie. ----- The purchaser was allowed his option, when the seller was in *mora*, either to pay annualrent to the seller, or to account to him for the rents of the land. Durie, 8th March 1627, Stirling *contra* Panter. The like, Durie, 20th July 1626, Ld. Clunie *contra* Ogilvie. ----- Annualrent found due, not only for the price of lands, the buyer having possessed the same, but also for the price of a discharge of the reversion of the lands. Auchinleck, (*Annualrent*) 17th December 1628, Laury *contra* Graham. ----- The Lords found, That tho' a minute of sale of lands mentioned no annualrent, yet the price must bear interest from the date of the minute, *ex natura rei*, without paction, tho' the purchasers were in possession of the lands, disposed by the minute, many years before the same, by virtue of wadsets and other rights. Fountainhall, 23d February 1684, Earl Nithsdale *contra* Duke and Dutchess of Buccleugh. ----- The granter of a bond, for the price of a liferent, affecting lands purchased by him, was found liable for the annualrent thereof, from his entry, to the possession

feffion of the lands, altho' the bond bore the principal sum to be payable only at the first term of Whitsunday or Martinmas, after the purchaser's right should be ratified by some persons having interest to quarrel the sale, with annualrent after the said term, and made no mention of annualrent before. Forbes, 23d July 1707, Baillie *contra* Walker.

A PURCHASER of salt having accepted a bill for the price, which he was obliged to pay to an indorsee, upon distress, was found entitled to the annualrent of his money, from the time he paid the same until delivery of the salt, the seller having been in *mora*. Bruce, 8th December 1714, Lesly *contra* Robertson.

ANNUALRENT not due *in conditione indebiti*. Auchinleck (*Annualrent*) 25th January 1628, Houston *contra* Donaldson. ---- Yet in a *condictio indebiti*, tho' the Lords would not allow of annualrent, they decerned the defender in a considerable sum, in name of damage and interest, which was near equivalent. Gosford, 5th July 1677, Gray *contra* Cuthbert. ---- The like, Fountainhall, 30th July 1678, Blair *contra* Gilmor. ---- Found that money, *bona fide*, uplifted, is to be restored without interest, tho' the money belong to a minor. Falconer, 9th March 1684, Lockhart *contra* Ellies.

Due to Cautioners, Mandatars, &c. as recompence for advancing their own money upon the Constituent's account.

BEFORE the act of federunt 1590, no annualrent was allow'd to a cautioner, for the sums he paid out upon the principal debtor's account, where the bond carried none. Nicolson, (*Annualrent*) 15th November 1627, Dick *contra* Black. ---- A cautioner, who, upon distress, pays the debt, has right to annualrent of annualrents paid by him for the principal debtor, from the time of the payment. Stair, 7th February 1662, Lockerbie *contra* Applegirth. Forbes, 27th June 1706, M'Micken *contra* Kennedy. ---- The act of session 1590, allowing cautioners annualrent for the haill sums paid out by them, extended to a debtor, bound conjunctly and severally, who has a bond of relief from the other co-obligant. Durie, 15th November 1627, Black of Largo *contra* Dick. ---- The said act of federunt 1590, was extended against the executors and representatives of the principal debtor. Durie, 12th July 1628, Ld. of Moristoun *contra* Ld. of Frendraught. ---- A cautioner having paid annualrent without legal distress, the Lords found, That he had no right to crave annualrent of the said annualrent, the payment having been voluntary: Yet here the Lords modified as much of the penalty as near came to the half of the annualrents. Gosford, 18th July 1668, Sir James Stewart *contra* Lord Belhaven.

ELAPSING of the term of payment, and registration of the bond, sufficient distress to entitle the cautioner to claim annualrent of the sums he pays out for the principal debtor. Durie, 24th January 1627, Ld. Wauchton *contra* Ld. Innerwick. Spotiswood, (*Usury*) 16th January 1627, Cranston *contra* Chrichton.

A SUM of money being advanced by the managers of a person of Quality's estate, to one of his Lordship's friends, who, by advice of other relations of the family, went abroad, to acquaint him with the state of his affairs, and solicited his home-coming; the Lords found the master himself, after his home-coming, bound to allow the money so advanced, tho' the said friend's journey prov'd at that time ineffectual; but refused to allow annualrent. Bruce, 1st December 1714, Baillie Smith's children *contra* Earl of Winton. ——— The Lords refused to find annualrent due to an heritor, insisting against other heritors for relief of their proportions of a glebe designed to the minister, there being here neither *pactum* nor *mora*, since it was the pursuer's fault that he did not insist sooner. Gosford, 6th June, Dirleton 7th June 1676, Ld. of Stenhope *contra* heritors of Tweeds-muir. ——— Found, That an answered letter of credit, with the possessor's receipt thereon, did bear annualrent, like a bill of exchange, from the time of the advancing the money. Marcus, (*Bills of exchange*) March 1682, Sir John Falconer *contra* Ld. of Grant. ——— When a tutor pays out a sum of his own for his pupil's affairs, he ought to have allowance of annualrent, till the time he had, or might get in the pupil's annualrents. Marcus, (*Tutors and Curators*) March 1683, Cornet Murray and his Lady *contra* her son. ——— A factor allowed annualrent for his several advances upon his constituent's account, from their respective dates, according to l. 12. § 9. Mandat. December 1736, Aubray and Cullen factors in London *contra* executors of Ros.

If due to Creditors upon a bankrupt Estate after a sale.

AFTER a sale before the Lords of a bankrupt estate, a creditor, whose debt did not bear annualrent, and who had not adjudged, was preferred upon an inhibition; and, in virtue of that preference, insisted, not only for a proportion of the price effecting to his sum, but also for the annualrents of that proportion as accessory, arising due since the decree of sale; the Lords found he had no claim but for payment of his sum without annualrent, seeing his debt bore none. Forbes, 25th June 1713, Carmichael *contra* Lockhart.

Annualrent allowed *ob favorem*.

A LEGACY being left to a bastard daughter, the one half payable at her marriage, the other at the death of the testator's wife; the Lords considering, the one term was in the legator's own power, and that it was unfavourable to put her to the necessity of marrying, sustained annualrent for that half, but not for the other. Stair, 25th June 1664, Inglis *contra* Inglis.

AN heir of Tailzie, being bound to pay to the heirs female a sum at their perfect age, was decreed to pay the annualrent thereof, after they were past twelve years old, tho' not mentioned. Colvil, Colquhouns *contra* Ld. of Lufs.

MONEY left in testament to the poor, found to bear annualrent from the death of the testator. Arskine, 4th March 1624, Minister of Northberwick *contra* Home. — The contrary found, Fountainhall, 5th July 1700, poor of Cardross parish *contra* M' Adam. Yet if the executor either make use of the money, or be in *mora*, by not giving to the legators timeous advertisement of the legacy left them, in either of these cases he will be liable, *Ibid.*

THE Lords found in general, That notwithstanding the disposition of the Roman law, annualrent for tocher is not due by our custom, unless expressly so provided. Dirleton, 20th December 1676, Carnegie *contra* Durham. Durie, 23d March 1624, Hamilton *contra* Livingston.

What puts a stop to the course of Annualrent.

A Bond heritable by stipulation for annualrent, being payable upon a simple charge, it was doubted, if the charge, which made the sum simply moveable, did not make the annualrent cease. The Lords did what was equivalent; they decreed for as much of the penalty as made up the annualrents of all terms since the charge. Durie, 25th July 1626, Austine *contra* Ker. — A debtor, upon a relevant reason of suspension, having consigned a sum due by bond bearing interest, and thereafter, for more security, having uplifted the same, in respect he was liable for the hazard of consignment, the Lords found, That this did not stop the course of interest without difference, whether he made profit or not. Stair, 14th January 1668, M'Pherson *contra* Wedderburn.

ANNUALRENT, INFESTMENT OF.

ANNUALRENTS of old had no effect, but by poinding of the ground, and produced no personal action for mails and duties. Durie, 24th March 1626, Gray *contra* Graham. — But afterwards, arrestment of mails and duties was sustained, laid on in the tenants hands, upon the foundation of the annualrent-right. Durie, 20th July 1633, Earl Annandale *contra* Earl Nithsdale. — And more directly a personal action was sustained by the Lords, upon a right of annualrent, against the tenants, for the mails and duties effeiring to the said annualrent. Dirleton, 20th December 1676, Ker *contra* Hunter. — And an annualrenter, who had a poinding of the ground, pursuing the tenant personally after his removal from the ground, the same was sustained. Gosford, 1st February 1670, Wilson *contra* Ruffel. — Which personal action was extended against all intromitters with the mails and duties. Durie, 15th March 1637, Guthrie *contra* Earl of Galloway. But, in this case, a poinding of the ground had preceeded. — See also, upon this point, Durie, 15th July 1629, Hamilton *contra* tenants. — An infeftment of annualrent is no sufficient title whereupon to pursue a personal action for mails and duties, unless an assignation to the mails

If the annualrent-right be a foundation for mails and duties.

and duties be contained in the annualrent-right. But an annualrenter, after obtaining a decret of poinding the ground, finding her diligence disappointed, by the goods being privately carried off the ground, the Lords, in a new process for mails and duties, found the tenant liable personally for the mails and duties, to the extent of the goods that were upon the ground at the time of the citation in the poinding of the ground; because the subject was thereby rendered litigious. Fountainhall, 5th July 1701, Kinloch *contra* Rochhead.

An annual-
renter cannot
remove te-
nants.

AN annualrenter cannot remove tenants, nor does the infestment bar the heritor from setting new tacks. Durie, 9th March 1630, Auld *contra* Yule.

Annualrent
how extin-
guished.

A RENOUNCIATION found not sufficient to extinguish an annualrent-right established by charter and sasine, in prejudice of a singular successor, thereafter acquiring right from the annualrenter. Durie, 23d November 1627, Dunbar *contra* Williamson. — But a registered renunciation, without necessity of a resignation, extinguishes an infestment of annualrent, *quoad omnes effectus*, even against a singular successor. Fountainhall, 2d January 1705, Heirs of Learmont *contra* Gordon. Stair, 7th January 1680, M^cLellan *contra* Musket.

DISCHARGE of annualrent effectual against a singular successor by apprising, in the infestment of annualrent. Stair, 7th January 1680, M^cLellan *contra* Musket. — In an infestment of annualrent, constituted after the new form, as an accessory security to the principal personal obligation, payment of the principal sum, obtained by poinding of the ground, was found effectual against a singular successor, in the annualrent, without renunciation. Stair, 8th July 1680, Rankin *contra* Arnot.

A CREDITOR in an infestment of annualrent, conveyed the same by assignation, but, before intimation or infestment by the assignee, having discharged the same to the debtor upon payment; this discharge was found *funditus* to extinguish the infestment, even in prejudice of the assignee, so as in a competition to prefer a creditor, whose infestment was posterior to that of the assignee's. Forbes manuscript, 8th June 1714, M^cDoual *contra* Fullerton.

REQUISITION or charge, when requisite, in order to diligence. See Legal diligence.

AFTER diligence by adjudication, &c. If the annualrenter can recur to his real right. See Right in security.

ANNUALRENTER uplifting more than his annualrents, if the superplus will impute in payment of his principal. See Payment.

AP

A P P E A L.

FROM the Lords of session, to the parliament of Scotland, whether effectual, Stair, 5th February 1674, Earl of Dumferline *contra* Earl of Calendar.

In a competition betwixt a lady, who stood in feft for her jointure, and a creditor, who had arrested in the tenants hands, for crops 1707, and 1708; the lady having appealed, and the appeal being received in the house of Peers, and execution by their writ of *Certiorari* lifted thereupon; and now the creditor having arrested for the crop 1709, and insisting in a furthcoming *super iisdem mediis*, the Lords found, That the former appeal could not extend to this case, being for another year, and could neither stop procedure nor execution, till the house of Peers should interpose their authority, which they had not done to this new process. Fountainhall, 19th July 1710, Mrs. Lyon and her assigney *contra* Lady Kinnaird.

MR. Archibald Muir minister of the Gospel, was deposed by the synod of Lothian, the sentence was appealed, and affirmed by the next assembly; the Lords found, That the sentence of the assembly, behoved to operate *retro* from the date of the sentence affirm'd; and that Mr. Muir ceased to have any claim for stipend, from that time, notwithstanding of the appeal. July 1723, Muir *contra* Hepburn of Nunraw.

A P P R E N T I C E.

A CHYRURGION's apprentice being bound for four years, and his master dying at the end of the first two, so that the apprentice was forced to enter with another, being unwilling to accept of the offer made by the relict, to entertain him still at bed and board, and keep a man, who himself had past his apptenticeship, to instruct him; and having pursued her on the passive titles, for repetition of half the fee with the annualrents; the Lords found a recompence due to the apprentice, in the event of the master's death, during the currency, but, did not think it was to be divided equally *pro rata temporis*, seeing the master could have little benefit by his apprentice's service during the two years it stood, and therefore, refused to sustain the repetition for the half, but only for a third of the apprentice-fee; and sustain'd that answer, That she offered to instruct him by a man who had past his apprenticeship, and he refused. Fountainhall, 17th February 1711, Cutler *contra* Littleton. — A cautioner for an apprentice, being charged, upon an indenture, for dammages, upon account of the apprentice's running away; it was found relevant, That the cautioner offered him back

within two or three days. Fountainhall, 17th December 1686, Malle-
nius *contra* Baillie.

IT being objected against indentures, between a master and his ap-
prentice, That they were null by the statute 8th year of Queen Anne,
imposing a duty upon sums stipulated by indentures, in regard that,
contrary to that statute, five guineas had been paid to the master's wife,
more than the apprentice-fee inserted in the indentures; the Lords found
it relevant, to annul the indentures, that the complement to the wife
was contracted or agreed for, at, or before signing the indentures; and
also found it relevant, That the complement was given with the ma-
ster's knowledge, after signing the indentures, and before tendering the
duty, tho' not previously bargained for. 20th January 1727, Horse-
burgh *contra* Hyflop.

Approbate and Reprobrate.

FOUND, That a party might lawfully approve, and make use
of one part of an instrument for proving his intent, and yet offer
to improve another part of the same as false. Maitland, 12th Ju-
ly 1566, Wier *contra* Ed. Ley. — Found, That a party might
found on the concession and acknowledgment, in a paper granted by the
contrary party, and, at the same time, might deny the other facts
(which made against him) alledged in the same paper. Bruce, 22d
July 1715, Sir Patrick Home *contra* Earl of Home.

A **THIRD** party was allowed to approbate one clause of a writ in
his favours, and to reprobate the rest. Stair, 23d June 1671, Lady
Ballagan *contra* Lord Drumlanrig.

If tutors acquire real rights in favours of their pupil, and clog them
with unjust and undue substitutions, the pupil may get the substituti-
ons (by which they or their heirs are leised) to be declared null, and
yet have the benefit of the real right. Fountainhall, 17th Novem-
ber 1703, Gray and Somervell *contra* Abercrombie. — A
person whose estate in his contract of marriage was provided to
the heirs of the marriage, did thereafter, in implement of the
contract, dispoise his estate to his eldest son, but reserving to him-
self a power to alter at his pleasure. The eldest son having died in-
fest, and his relict claiming a terce, it was objected by a second son of
the marriage, to whom the father, in virtue of the reservation, had
gratuitously disponed the estate after the eldest son's death, That the el-
dest son's infestment, upon which the pursuer's claim was founded, was
evacuated by the conveyance in his favours; and that if the Pursuer did
plead upon her husband's right, she must take it as it stands. Answered,
The reservation must be held *pro non adiecto*, being repugnant to
the limitation in the contract of marriage; and the pursuer's husband
had never accepted of the disposition, to tie him down to the unreason-
able condition. The Lords found the pursuer might plead upon her
hus-

husband's infestment; and yet impugn the reservation therein contained, as being gratuitous, and in prejudice of the contract of marriage. 26th January 1731, *Fea contra Trail*. The question occurred, Whether one who had succumb'd in the reduction of a writ, wherein he had a partial interest, could afterwards recur to the writ, and take the benefit thereof? The objection sustained. Stair, 21st December 1680, *Anderfon contra Bruce*. But afterwards repelled. January, 1727, *Miln contra Gourlies*.

By a disposition in favours of an eldest son, he is taken bound to pay the father's debts contained in a list, one article of which was 11000 merks, in name of provision to the younger children; and it is declared, that he is to be no further liable to any of the father's engagements. The younger children not knowing of any other provision, insisted against their brother for 11000 merks, and obtained payment; but thereafter, finding a greater sum provided to them in their father's contract of marriage, they insisted against their brother for the balance, as liable *præceptione hæreditatis*. The Lords found, That the younger children having founded upon the disposition as their active title, and as containing a burden and provision in their favours, they cannot now insist to make the Defender further liable, contrary to the express terms of the disposition. Dalrymple, 8th December 1703. *Allan contra Ld. Airth*.

ARBITRATION.

FOUND, That arbiters cannot decern for a penalty, other or greater than is contained in the submission; and, for this reason, a decret-arbitral, in which a greater sum was decerned, in name of penalty, was restricted *quoad excessum*. 24th February 1739, creditors of Biquhan *contra* Grossart. — Arbiters cannot decern their decreets to take effect by summar diligence, unless the parties submitters interpose their consent thereto. Forbes, 12th March 1707, *Knox contra* Home.

Power of arbiters

ONE of the parties submitters craving, by bill to the Lords, that they would compel the arbiter who had accepted, to meet and determine, the Lords declared, That, if there had been a clause of registration, he might have been charged with horning, to meet and determine; but, that being omitted, they refused to interpose to supply the defect. Fountainhall, 30th June 1699, *Chiesly contra* Calderwood. — A landlord insisting for diligence upon a decret obtained against his tenant, it was objected, That the decret stands submitted. Answered, One of the arbiters has renounced the submission, by a writ under his hand. The Lords found, That an arbiter cannot renounce a submission, seeing he can be charged with horning to determine: And this, tho' it was alledged the tenant had no view in the submission, but to gain time, in order to delapidate his effects; as to which, the Lords

Arbiters may be compelled to determine.

N

found,

found, they could give no remedy, and that the party ought to have been upon his guard when he entred into the submission. Fountainhall, 8th February 1704, Cairncross *contra* Hunter.

Summoning
of witnesses.

Two arbiters in a submission, did, by bill, obtain warrant from the Lords, to summon witnesses, in relation to the submission, to compear and depone before them. Stair, 6th January 1670, Ker and Scot supplicants.—— A cause being in dependence before arbiters, the Lords, upon supplication of one of the parties, granted diligence, by horning, to cause third parties, in whose hands there were papers that were necessary for instructing his Claim, exhibite these writs. Fountainhall, 26th June 1696, William Stevenson supplicant.

Time of en-
durance.

A SUBMISSION blank in the endurance lasts but for a year. Stair, 23d February 1672, Wallace *contra* Wallace.—— An arbiter may determine, at any time, even after year and day of the date of the submission bearing no time within which he should determine, provided the parties submitters be alive at the time of the decret. Durie, 25th February 1630, Maxwell *contra* Roger.—— A submission bearing no day, betwixt and which the arbiters should determine, expires after year and day; and is not like a bond obliging parties to submit, which doth not so expire. Gilmor, February 1665, Menzies *contra* M'Gregor.—— A bond wherein a man submitted himself to the determination of certain persons therein named, was found to last during the lifetimes of the judges; and that it did not expire with the year and day, as ordinary submissions do. Haddington, March 1593.—— The like, Stair, 3d February 1669, Boswell *contra* Lindsay.—— A submission was sustained, wherein the judges were impowered to decide when they pleased; and the submission to endure as long as they willed. Hope (*Arbiter*) 6th July 1610, Johnston *contra* Napier.—— A decret-arbital was sustained, tho' given after the year; because the submission contained also a bond, whereby the parties gave power to the judges to determine what proportion of the goods in controversy should be given to a third party concerned, but not subscribing the submission, tho' now claiming the benefit of it; which bond containing no day nor blank, was found more than a simple submission. Durie, 14th March 1639, Hepburn *contra* Hepburn.

Decreet-
arbitral sub-
scribed after
expiry of the
submission.

A DECREET-arbital was found null, subscribed after the submission was expired, tho' pronounced within the time. Stair, 2d December 1680, Pitcairn *contra* More. Haddington, penult January 1608, Hamilton *contra* Hay. Fountainhall, 18th November 1696, Watson *contra* Miln.—— The Lords reduced a decret-arbital, because some of the arbiters had subscribed after the time limited, tho' others had signed before it elapsed; and all of them had given command, before elapsing, to fill up the blank in the terms concerted. Newbyth, 28th February 1666, Freeland *contra* Freeland.—— A decret-arbital sustained, tho' pronounced *in ipso termino*, i. e. upon the very day betwixt and which it was to be pronounced. Hope, (*Arbiter*) 21st December 1614, Monteith *contra* Carmichael. Fountainhall, 30th June 1694, Wilson *contra* Haddo.—— A minute of a decret-arbital being written, tho' not in form, in a paper apart, and signed by the judges within the days appointed to decern, and intimate *debito tempore* to both parties,

parties, the Lords found, That, even after the day was elapsed, the judges might insert their decret-arbitral, formally extended, in the blank on the back of the submission, always keeping the substance of the said minute, and inserting no other thing material, but what was therein contained. Durie, 27th March 1633, Forrester *contra* Gourlay. — The like, Durie, 2d March 1636, Ld. of Altar *contra* Ld. of Auchinleck. Fountainhall, 4th January 1699, Earl Crawford *contra* Bruce. — Arbiters may ordain all writs, in implement and prosecution of their decret, to be extended at their sight, after expiring of the submission. Forbes manuscript, 30th July 1714, Colonel Erskine *contra* Lady Mary Cochran.

FOUND, That where a submission gives power to decern before such a day, and in case of variance, the oversman to decern after that day, if he decern before the first day, his decret is null. Haddington, Hope (*Arbiter*) 28th January 1612, Campbel *contra* Ld. of Calder. — A decret-arbitral pronounced by an oversman, found null, in respect it did not bear, that the arbiters had varied, without which the oversman could not interpose. Dalrymple, 30th November 1716, Gordon *contra* Abernethy.

IT being objected against a decret-arbitral, That a party was decerned in 5000 Merks, without mention of any cause, nor any thing produced to instruct that he was at all debtor; for this reason it was found null, unless the cause thereof could be proven. Stair, 23d February 1672, Wallace *contra* Wallace. — Decreets-arbitral used of old to be reduced for enorm lesion, tho' no bribery was alledged. Balfour (*Arbitration*) 17th March 1541, Black *contra* Hamilton. — A decret-arbitral being suspended, upon the alledgance, that some facts mentioned in the decret, as the foundation of the decerniture, were utterly false, which was offered to be proven by the oaths of the arbiters themselves, the Lords refused to sustain this as a reason of suspension; tho' it was urged, That the suspender is founded in the very words of the regulations 1695, allowing decreets-arbitral to be called in question, upon the head of *corruption, bribery and falshood, alledged against the judges arbitrators who pronounced the same*; where the word *Falshood*, being directed personally against the judges arbitrators, cannot be understood in any other sense, than their pronouncing decret-arbitral upon false suggestions. 18th December 1724, Hardie *contra* Hardie. — In a reduction of a decret-arbitral, in which gross iniquity was alledged, it was condescended on, That, during the dependence of the submission, the arbiter had accepted of a gratuitous assignation from one of the parties, the Lords found, That the arbiter could not warrantably accept of any gratuity during the currency of the submission; and that the assignation, bearing a sum of money instantly delivered, could not be constructed to be granted for payment or security of the debts condescended on by the arbiter to be owing to him by the cedent; unless there had been a back-bond, or discharge, or some other document execute at the time of the assignation, declaring the true cause. Dalrymple, 14th January 1715, Mitchell *contra* Fulton. — Arbiters, who by the submission had a power of prorogation, having signed their decret-arbitral, refused to give the same out to the parties, until they were paid for their labour and pains, and

Oversman,

Reduction
of decret-
arbitral.

continued the submission current by prorogations, until this should be adjusted. One of the parties who judged the decret beneficial to him, paid the sum demanded, and got the decret put into the register. In a reduction of the decret by the other party concerned, the Lords found the reason of reduction relevant and proven, that the decret-arbitral was obtained by bribery and corruption, and therefore reduced the same; and ordained the arbiters to pay into the clerk of the process the sum received by them, to be bestowed on charitable uses. 12th January 1738, Blair *contra* Gib.

SOLEMNITIES of submissions, and decreets-arbitral, to make them bear faith. See Writ.

ARBITERS named jointly. See Solidum & pro rata.

ARBITERS determining in some articles, leaving others open. See Indivisible.

CHARGE upon a decret-arbitral, upon what number of days. See Induciae legales.

GENERAL submission, what it imports. See General submission.

Arbitrium boni viri.

MODIFICATION of an aliment being pursued by a Lady against her husband who was out of the country, founding on a contract made betwixt them, whereby he was obliged to pay to her such sums as some friends therein named should modify, and these friends being dead or absent, the Lords sustained her action, tho' the contract was betwixt husband and wife; and found, That the modification came in their own hands, as in *arbitrio boni viri*. Durie, 23d July 1629, Lady Buchannan *contra* the Ld.——In a question touching the import of a tack of tiends set by a minister, to endure for his life, and for blank years thereafter, the Lords observing, that the blank was scored, they thought, that it could not now be supplied nor filled up; and therefore found the tack expired with the life of the setter. Fountainhall, 15th July 1696, Lumisden *contra* Home.——Found, That the Lords of session might determine the quantity of a legacy *collatum in arbitrium tertii*, according to the defunct's estate, and circumstances of the person, in the case of the third party's death, or refusal to declare it. Marcus, (*Legacy*) January 1684, Mr. George Shiel *contra* Janet Alison.——Marriage being free, was found not to annul a bond of provision by a father to his eldest daughter, "she marrying with his consent, and of those named by him as her curators, or otherwise she should only have the sum of blank," which was never filled up; yet the Lords found they might fill it up, if she had transgressed the clause; and thereby restricted the provision, according to the match she made. Stair, 23d February 1681, Hamilton *contra* Hamiltons.——A tack being set to a man, his heirs and sub-tenants, whom

whom the fetter should be content with, and accept of allenary, including his assignies, and the tacksmen having made a subbet without the heritor's concurrence, the question occurred, What was the import of the above clause? Whether it intitled him arbitrarily to withhold his consent; or, if he was obliged to give reasons for his dissent, to be judged of *secundum arbitrium boni viri*? This debated, but not ultimately determined.

February 1732, Lady Monkton *contra* Balderston. ----- A gentleman having given a bond of provision to his sister for 3000 merks, took a back-bond from her, importing, "That, it being rather too great for his circumstances; therefore she consented, that the same should be mitigated by friends; to be chosen *binc inde*, her mother being always one." After the mother's decease, the brother's creditors insisting for a mitigation, *secundum arbitrium boni viri*, it was answered, That the condition of the mitigation had failed, the mother being now dead; and therefore, the bond must subsist *in totum*, as if this power of restricting had never been. The Lords found there was no arbitrimen in this case, and that the bond subsisted *in totum*. 19th February 1734, Corfan *contra* Maxwell of Barncleugh. ----- Colonel Campbell being bound, in his contract of marriage, to secure the sum of 40000 merks, and the conquest, during the marriage, to himself, and spouse in conjunct fee and liferent, and to the bairns to be procreate of the marriage in fee, did, by a death-bed deed, settle all upon his eldest son, burdened with the sum of 30000 merks to his younger children, to take place in case their mother should give up her claim to the liferent of the conquest, and restrict her self to a lesser jointure, otherwise these provisions to be void; in which event, it was left upon the Duke of Argyle and Earl of Ilay, to name such provisions to the children as they should see convenient. The referees having declined to accept of the trust reposed in them, the question occurred betwixt the heir and younger children, Whether their powers were devolved upon the court of session to determine provisions to the younger children *secundum arbitrium boni viri*; or, if the younger children were to be left to the extraordinary remedy of reducing the testament, upon the claim they had by the contract of marriage? The Lords found, That the duke of Argyle and Earl of Ilay, having declined to execute the powers vested in them by Colonel Campbell, their powers are not devolved on this court *tanquam boni viri*. 22d December 1739, Campbell *contra* Campbells.

ALTHO' in a reversion it was provided, that whatever expences should be bestowed upon building, should be refounded at the redemption, yet a building being disproportionate to the smallness of the room, the Lords modified the expences thereof to a fourth part. Haddington, 10th June, 1612, Homes *contra* Ld. Blacader.

ARRESTMENT.

UPON a decret of a baillie, a precept being obtained from the Sheriff for arresting in the hands of debtors within the shire, the arrestment was found null, in respect it is unwarrantable in a sheriff

sheriff to interpose his authority summarily to a baillie's decret, by giving a precept of arrestment thereon, without citing the party concerned. Forbes, 21st January 1710, Forbes *contra* Catanach.

Formalities
of arrestment.

A MAN having obtained decret against his debtor, and thereon raising letters of arrestment, and also a summons to make furthcoming, and sending them both to the country, where they were put in execution at once; in the action of furthcoming, this being alledged to be a no-procefs, because the procefs was raised before the arrestment was laid on, and so was *filius ante patrem*; yet the Lords considered, That the practice had grown up near to a custom, and that it might occasion the quarrelling of many diligences, if rejected; and that, in such cases, *error communis* is allowed *jus facere quoad preterita*. And that the custom would abridge proceses, and save much expence to the people: Therefore they sustained the summons of furthcoming, and repelled the no-procefs, notwithstanding the evident incongruity which was down weighed by the conveniency of the subjects. Fountainhall, 7th January 1704, *contra*.

Formalities
of decret of
furthcoming.

IN a procefs of furthcoming, the judge ordain'd the arrestee to produce the goods, in order to be roup'd and sold for payment of the pursuer's debt; this was found an effectual decret of furthcoming, so as to bar another creditor, who offered to poind before any step was taken upon this ordinance, it being pled, That this was the regular method in furthcomings of goods. Stair, page 375, and equivalent to a simple decret of furthcoming where money is arrested, and a certain sum decreed to be made furthcoming. 17th February 1735, Muirhead *contra* Corrie.

Upon what
debts may ar-
restment be
founded.

ARRESTMENT found competent, as well as poinding, upon a bond heritable by an obligiment to pay annualrent, tho' such bonds were not then arrestable. Durie, 7th March 1628, Wilson *contra* L. Drumlanrig. ——— Arrestment sustain'd, founded upon a personal bond, tho' there was an heritable bond of corroboration granted of the debt, upon which infestment had followed; and so the debt which was the ground of arrestment, was secured by infestment. Fountainhall, 18th January 1695, Fraser *contra* Cleghorn. ——— An heritable bond before infestment, may be the foundation of an arrestment, because such a bond is arrestable. Forbes, 17th June 1712, Ker *contra* creditors of Harden.

A BOND of relief in the following terms, obliging the granter to relieve his cautioner, and to retire the creditors bonds, betwixt and a certain day, being *ad factum prestandum* only, was found no ground for arrestment and furthcoming, even after the day was elapsed. Dalrymple, 6th January 1702, Blackwood *contra* Brown. ——— The Lords upon a party's supplication found, That a depending procefs of reduction (which concludes not the payment of money, but the removing a right out of the way) is not the proper ground of an arrestment; and therefore, ordained an arrestment used upon such a depending reduction, to be loosed without caution or consignation. Forbes, 26th February 1712, Ross supplicant *contra* Renton.

A SUM being payable at a term, and the debtor bound to pay annualrent for the same yearly after that term till payment; this sum, as being heritable, was found not arrestable. Durie, 29th July 1634, Ld. of Lugton *contra* creditors of Dishington. ----- But the sum is arrestable before the term of payment. Durie, 29th January 1635, Ker *contra* Knows. ----- And a sum being destin'd to be laid out upon annualrent, after a debtor's death, was found in the mean time arrestable. Durie, 20th March 1633, Simpson *contra* White. ----- A sum not bearing expressly annualrent, but a certain quantity of victual yearly in place of annualrent, found arrestable. Durie, 24th November 1629, Lindsay *contra* Ld. Lauriston.

What subjects
arrestable.

THE Lords found a bond, made payable at a Whitsunday, and which sum was then destinate in the bond to be imploy'd upon land, or annualrent to the creditor, and his heirs male of his body, which failing, to his brother's son, his heirs, &c. to be heritable by destination, and therefore, not arrestable after that term. Hope, (*De heridibus*) 14th July 1620, Couper *contra* Aitkman. The contrary found. Durie, 28th June 1637, Galbraith *contra* Lennox. Fountainhall, 11th June 1712, Robertson *contra* Robertson.

A SUM secured by infestment, being payable at four terms, and the debtor personally bound for the same; the first moiety being arrested in the debtor's hands after the term of payment, but before the said debtor was charged to make payment; the Lords found this sum not arrestable. Durie, 16th July 1624, Ld. Monimusk *contra* Ld. Banachie.

AN heritable bond whereupon infestment had followed, but not registered in the terms of the act of parliament 1617, was found arrestable, and the arrester preferred to the posterior adjudger of the bond, altho' the 60 days allowed for registration, were not run at the time of the arrestment, so that the arrestment might have been evacuated by registration thereafter. Dalrymple, Forbes, 20th February 1706, Stewart of Torrance *contra* creditors of Dundas.

A PARTY having led an apprising, the sum thereafter was not found arrestable by the appriser's creditors. Stair, 22d February 1666, Lockhart *contra* Lord Bargeny.

THE question occurred, with regard to a bond due to a married woman, the annualrents of which belonged to her husband, if an arrestment for his debt laid on in the debtor's hands did affect the *jus mariti*, or the annualrents only due at the date of the arrestment; the Lords found, That the arrestment carried no more than the annualrents that were fallen due, and the current term; and the reason given for it was, That arrestment can carry nothing but what is due to the common debtor when it is laid on, not being of the nature of an inhibition to affect *adquerenda*, that the proper diligence in this case, is, an adjudication against the husband, in whom the *jus mariti* subsists. 19th January 1739, creditors of Bernard Clunes *contra* Sinclair and her husband. Stair, 27th July 1673, creditors of Scot competing.

A PARTY having arrested his debtor's share in the African company's stock, in the hands of the directors and cashier, and pursuing a furthcoming, and also repeting a declarator, that the money stood affected by his diligence, and must belong to him, contending, That tho' the capital stock, by act of parliament 1695, is declared free of arrestments,

restments, it is otherwise now, the company being dissolved by parliament, on payment of the stock out of the equivalent ; the Lords found the company not personally liable, but that the arrestment affected the subject *tanquam nexus realis*, and, tho' they could decern in the furthcoming, yet they only decerned in the declarator, That the share due to the debtor fell to the arrester, and that the directors ought to transfer it over to him ; and when the commissioners of the equivalent got the African money paid to them, the arrester had right to claim his debtor's share thereof. Fountainhall, 18th March 1707, *Alison contra African company*.

MATTHEW Stewart having some bills payable to himself, sign'd blank indorsations, and gave them to Leckie of Arnmore to be delivered to some of his creditors ; before delivery, arrestment was used in Leckie's hands, and a furthcoming insisted in ; the Lords found, That exhibition, and not arrestment, was the habile diligence to affect bills thus deposited ; and therefore, that Leckie had warrantably given up these bills according to his commission, notwithstanding the arrestment.

December 1726, *Jamieson contra Leckie*. ----- A bill being indorsed in trust for the behoof of the common debtor, an arrestment laid in the hands of the trustee found effectual to carry the sum in the bill, and therefore was preferred to a second arrestment laid in the trustee's hands, after he got payment of the bill, and thereby became debtor in a liquid sum. 13th February 1740, *Sir Harry Innes contra creditors of Lodowick Gordon*.

TENANTS being decerned to pay a certain sum to the heritor, in order to be employed for the reparation of a house of his liferented by a third party ; this sum was not found arrestable for the heritor's debt, being destinated to a certain purpose, wherein the third party was concerned. Stair, 15th January 1674, *Baillie contra Nasmith*.

IN a furthcoming of a sum consigned for redeeming a wadset upon an arrestment, laid in the consignatar's hands, itw as considered, That, strictly speaking, consigned money is not the property either of wadsetter or reverser, that the property is *in pendent*, and belongs eventually to the wadsetter or reverser, according as the redemption takes effect or not ; and if the redemption take effect, it is understood to have belonged to the wadsetter from the date of the consignment, and therefore, in that event not attachable by the reverser's creditors : Before redemption, indeed, the reverser may pass from his order, and uplift his money ; but then, this is a personal privilege, which does not transmit to his creditors arresting ; the Lords found, That the arrestment does not bar the redemption. 26th June 1739, *M' Kenzie of Dundonald contra Tuach*.

In whose
hands may ar-
restment be
laid.

A MERCHANT proprietor of a cellar, wherein he had some hogf-heads of tobacco, let out the half of the cellar to a neighbouring merchant, and they had a common key, which sometimes the one, and sometimes the other kept, as their purposes required : At a time when the key happened to be in the tenant's possession, an arrestment was laid in his hands, by a creditor of the proprietor of the cellar, who had his own tobaccoes in that half of the cellar which was not set : In a competition betwixt the arrester and a voluntary assignee, whose right was posterior to the arrestment ; the Lords found the arrestment an inept

inept diligence, because the arrestee was not custodiar of the tobaccoes; or in any proper sense a possessor, so as to be liable to any action for delivery, or making furthcoming. 19th January 1733. Hunter *contra* Lees.

THE Lords found, That by an arrestment in a debtor's own hands, his whole goods are so hypothecated, that they cannot be disposed in prejudice of the arrester. Durie, 10th January 1624, Ld. Innerweek *contra* Wilkie. Falconer, Fountainhall, 10th November 1685, Shaw *contra* M'Niels. November 1687, Gairdens *contra* Toshoch.

A MAN who was debtor to another for the price of some victual, having given a factory to his own wife, who, by virtue thereof, uplifted debts due to her husband, and the creditor both arresting in her hands, and in her husband's, and thereafter transferring the debt after the husband's decease against his heirs *passive*, and pursuing furthcoming against the wife and children; the Lords sustained the arrestment, and ordained the wife to depone what was in her hands at the time, reserving to her to be heard upon any title by which she might crave preference to the pursuer; but found, That the debt must first be constituted; tho' here it was alleged, That arrestment in a debtor's own hand was never before allowed, save once. Fountainhall, 18th July 1706, Home *contra* Pringle.

AN arrestment was not sustained, because used not in the hands of him who was debtor to the common debtor, but in the hands of his factor. Hope (*Arrestment*) Muirhead and M' Michael *contra* Miller. ----- The Lords refused to sustain arrestment in the hands of a factor, to found a process of furthcoming, of debt due by the constituent to the arrester's debtor, tho' the factory was very ample, *viz.* To uplift, assign, discharge, and dispose of sums, &c. Because, if a decreet of furthcoming against a factor, without calling his constituent, were sustained, the constituent's whole estate might, without his knowledge, be evicted out of his factor's hands, and perhaps for debts not truly due. Forbes, 18th January 1709, Donaldson *contra* Cockburn.

ARRESTMENT affects the mails of the current term, tho' laid on before they could be demanded from the tenants, because the term running *dies cessit*. Durie, 23d March 1624, Brown *contra* tenants. Stair, 28th, Gosford, 27th July 1669. Leslie's relict *contra* Cunningham. ----- And arrestment of the annualrents of an heritable sum, tho' made as well for terms to come as for bygones, was only sustained for bygones, and the current annualrents. Durie, 18th January 1628, Ld. of Halkerton *contra* Falconer. ----- An arrestment being laid upon a wife's annuity, payable out of lands, for a debt due by her husband, who had right to the annuity *jure mariti*, but the arrestment being used before the term, which the fiar of the lands therefore alledged was null, this not being like other arrestments which may be laid on before the term of payment, because there *dies cessit, licet nondum venit*, whereas here *nec cessit nec venit*, there being, in this case, no debt at all till the term, since it depended upon the joint lives of the man and wife till the said term came, yet the Lords thought, That the casting such arrestments might lay a foundation to defraud the creditors of liferenters; and therefore, their Lordships sustained the arrestment as valid to affect that current term. Fountainhall, 31st January 1705,

Arrestment
affects only
bygones, and
the term current.

1705, Corfe *contra* Masterton. ---- The like, Forbes, 16th June 1705, Hamilton *contra* Livingston.

If it reaches *adquerenda*. ARRESTMENT of the defunct's effects, some months before the common debtor was decerned executor-dative *qua* nearest of kin, was found not validated by the subsequent confirmation; and therefore, an assignation to the subject, after it was established in the common debtor's person by confirmation, was preferred to the arrestment. Forbes, 25th January 1711, Menzies *contra* Graham.

Arrestment laid on after the common debtor's death. ARRESTMENT used after the debtor's death, is not a *habile diligencia* for affecting his goods, and gives no preference in competition with other creditors who proceed by confirmation, or by pursuing the executors. Durie, 26th February 1633, Rutherford and Turnbull *contra* creditors.

Decree of furthcoming after the common debtor's death. IN an arrestment upon a dependence, if the common debtor die before the claim is established against him by decree, the same must be transferred against his representatives; but, if decree be recovered against the common debtor himself, there is no necessity of transferring the same, after his death, against his representatives; the bare calling of them is sufficient to found the arrester in his action of furthcoming, arrestment falling not by the death of the common debtor, as it does by the death of him in whose hands it is laid. Haddington, 8th March 1610, Dempster *contra* Dingwell. 26th February 1611, Clark *contra* Earl of Perth. Durie, 15th June 1626, Stirling *contra* tenants. Stair, 16th January 1679, Earl of Weemyss *contra* Ld. of May. Stair, 20th January 1681, Riddell *contra* Maxwell. ---- Tho' it has been found, That, even where the debt was liquid against the defunct, transference was necessary against his representatives. Durie, 13th March 1628, Somervell *contra* Heriot. Spottiswood, (*Transference*) 26th February 1624, Spittle *contra* Scot. ---- And the Lords once went so far, as to find, That an arrestment being but an inchoat and incompleted diligence, the common debtor deceasing, the sums arrested being *in ejus bonis*, ought to be confirmed; and that the creditor could not have action of furthcoming against the person in whose hands the arrestment was made, but ought to confirm himself executor-creditor. Dirleton, 6th December 1666, Lesly *contra* Bayne.

Arrestment, if it dies with the person in whose hands it is laid. THE Lords, upon a hearing in presence, found, That an arrestment does not die with the person in whose hand it was laid, but may be made effectual against his heir by a furthcoming, the subject being *in medio*; and, upon this footing, preferred an arrestment laid in the the defunct's hands, to an arrestment used against the heir. 22d December 1738, Earl of Aberdeen *contra* creditors of Scot of Blair.

Breach of Arrestment. ARRESTMENT being made, the party to whom the goods pertain or in whose hands they are arrested, having received a copy of the arrestment, and thereafter having intromitted with the goods, the arrestment not being orderly loosed, may be pursued for breaking the arrestment, and confiscation of his goods, and punishment of his per-

person; but another party who had no knowledge of the arrestment in meddling therewith, may only be pursued to make the goods furthcoming. Haddington, 9th July 1611, Wardlaw *contra* Gray.

ARRESTMENT upon a registred bond or decret is not looseable upon caution, but upon consignation of the principal sum and annual-rent, and caution for the penalty. Stair, 18th June 1675, Hamilton supplicant.—Which holds even in a baron baillie's decret. Stair, 23d December 1679, Grieve supplicant. ——— Also in a decret in absence. Fountainhall, 28th November 1695, Stewart *contra* Marshall. ——— Arrestment upon an unregistred bond looseable upon caution. Stair, 7th February 1665, Graham *contra* Bruce. ——— Arrestment upon a registrate contract was loosed, upon caution, the obligation therein being general and illiquid. Forbes, 31st July 1705, M'Farlan *contra* Cowie. ——— Arrestment in security before the term of payment of the arresting debt is looseable upon caution. Stair, Gosford, 4th November 1675, Mosman supplicant. Home, 27th February 1728, Meres and Rowland *contra* the York-building company. ——— Arrestment upon a dependence may be loosed upon caution. Gosford, 19th December 1673, Home *contra* Home. ——— And that even after decret has followed upon the dependence. Stair, 9th June 1677, Sibbald *contra* Sibbald. ——— Arrestment upon a decret found looseable upon caution, the decret having been suspended before the arrestment. Stair, Dirleton, Gosford, 20th November 1675, Warden supplicant. ——— The contrary had been found, Dirleton, 11th June 1675, Scot *contra* Murray. ——— Much more ought the arrestment to be looseable upon caution, the decret being turned into a libel. Stair, 30th June 1675, Murray *contra* Hall. ——— But arrestment founded on a decret is not looseable upon caution, where the decret is suspended after the date of the arrestment. 7th July 1733, Martine *contra* Smith.

Loosing of
arrestment.

ARRESTMENT is effectually loosed, tho' the letters of loosing be not intimated to the arrester. Dalrymple, Forbes, 18th July 1707, Crichton *contra* Borthwick.

THE rents of the college of St. Andrews being arrested, and it being an incorporation for which one will not readily be caution, the Lords allowed the arrestment to be loosed, the masters of the college giving a bond binding themselves and their heirs personally for what should be uplifted by them, whereby every person stood cautioner for his own intromission, they not being otherwise bound *personaliter*, but only *secundum officium*. Stair, 16th July 1661, College of St. Andrews supplicant.

AN arrestment being loosed upon caution, and the sum thereafter assigned, the Lords notwithstanding ordained the sum to be made furthcoming to the arrester, and preferred him to the assigney; for they considered, that the caution found in loosing arrestments is overly and insufficient, and therefore would not insecure creditors doing diligence by arrestment. Gilmour, 12th January, Stair, 7th February 1665, Graham *contra* Bruce. ——— Arrestment on a dependence being loosed upon caution, and the sum arrested thereafter assigned by the common debtor, in a competition betwixt the arrester and assigney, the assigney was preferred, in respect there was no decret extracted

upon the arrester's dependence, otherwise the Lords would have preferred the arrester, tho' his arrestment was loosed, as said is, and that without necessity of any new arrestments, the arrested sum still remaining unpaid. Stair, 4th July 1661, Raith of Edmonstoun *contra* Ld. of Niddrie.

A CAUTIONER, in loosing of arrestment, found liable to pay to the arrester, after his debt was constituted against the common debtor, and that without further discussion of the persons in whose hands arrestment was used. Durie, 2d February 1627, Lord Balmerino *contra* Ld. Lochinvar.

Ranking of
arrestments.

Two arresters competing in a furthcoming, the last arrestment was preferred, having *parata executio*; whereas the prior arrestment was laid on for security of a debt before the term of payment, which was not come at the time of competition. Stair, 29th July 1670, Charteris *contra* Neilson. Stair, 17th July 1678, Lord Pitmedden *contra* Paterfons. ——— An arrestment upon a dependence was preferred to a posterior arrestment upon a registrate bond, the dependence being finished by a decreet; so that there was *parata executio* at the competition. Forbes, 14th June 1710, Brodie *contra* M^r Lellan. ——— The like, Bruce's manuscript, 31st July 1716, Lord Royston *contra* Brymer.

ARRESTMENT laid on before the term of payment of the debt arrested, preferred to an arrestment laid on after the term of payment. Forbes, manuscript, 26th January 1714, King *contra* Donaldsons. Home, 2d January 1728, Watkins *contra* Wilkie. ——— The contrary had been determined. Stair, 23d January 1673, Mader *contra* Smith.

MANY debtors to a bankrupt, being pursued by several parties his creditors, to make arrested goods furthcoming, and using all convenient diligence without great priority, the Lords will ordain the sums to be divided amongst them, in proportion to their debts. Haddington, 18th December 1611, Speir *contra* Mure and Mureson. ——— The first arrester with the second decreet of furthcoming is preferable to the second arrester with the first decreet. Colvill, January 1583, Wallace *contra* Scot. ——— The Lords preferred an arrester, because he had first arrested, tho' his decreet of furthcoming was a day after another arrester; especially because he had a privilege in respect of the nature of his debt, it being for custom and excise. Newbyth, 10th January 1665, Seaton *contra* Jack. ——— The first arrestment was preferred, the decreets of furthcoming being both upon the same day. Stair, Newbyth, 1st February 1666, Cunninghame *contra* Lyle. ——— In a competition betwixt two arresters, the Lords preferred the first arrester, tho' the other had obtained a decreet of furthcoming, and so had a completed diligence, whereas the other was but inchoated. And this, because the first arrester had intended action of furthcoming before the Lords, where proccesses are tedious, and the pursuer not master of the calling, and the other had taken decreet in the mean time before a sheriff. Stair, Dirleton, 23d November 1667, Montgomery *contra* Rankin. ——— A first arrester who forbore to proceed in diligence, because he obtained, from the common debtor, assignation of the debt arrested, was not excluded upon the pretence of *mora*, but preferred to a posterior arrester who had done exact diligence. Stair, 5th July 1673, Birney *contra*

contra Mowat and Crawford. ----- The like, January 1733; M'Intosh *contra* Farquharson of Achrechin. ----- Two arresters competing, the Lords preferred the last decret of furthcoming, because this arrestment was a month prior to the other, and the common debtor had made compearance and opposition against him, and suffered the other decret to pass. Fountainhall, 28th February 1680, Robertson *contra* M'Ewen. ----- In a competition among arresters, the Lords preferred him who had the first citation, out-giving, inrolling and decret, in respect of his prior diligence, tho' the arrestments of the other creditors were prior in date, but their summonses for making furthcoming were some weeks posterior to his; for tho' of old (as the author observes) in such a case, the Lords used to bring in arresters, who were not *in mora, pari passu*; yet now their Lordships consider arrestment as an inchoat and incompleated diligence, and like to an assignation unintimated; so that if a posterior arrester get the first decret (which answers to an intimation) he is preferable. Fountainhall, 18th March 1685, creditors of Clark competing. ----- One party arresting two days before another, and both obtaining decret of furthcoming in one day; but the goods arrested being delivered up to the second, and he having, *ex abundanti*, caused poind and apprise them in his own hands; the Lords found, That the first arrestment made such a *nexus realis* on the goods (he not having been negligent) that it gave him preference to the second, tho' he first attained possession of the goods. Fountainhall, 15th January 1697, Wightman *contra* Cockburn. ----- The Lords brought in two arresters *pari passu*, whose arrestments were in one day, not expressing the particular hour; and this, tho' one of them offered to prove, That his copy of arrestment was given some hours before the others, because witnesses may mistake or forget the hour. Forbes, 28th June 1705, Sutie *contra* Ross. ----- A debtor in a furthcoming, having made payment, was decerned to pay over again to a prior arrester who obtain'd not decret of furthcoming till after the said payment. January 1724, Nairne *contra* Brown. In this case it was also found, That tho' the first arrestment was upon the 3d of March 1721, and the decret of furthcoming not till November 1723, this was not such a *mora* as to prefer the second arrester who had obtained the first decret of furthcoming.

In a competition amongst arresters, the Lords found in general, That arresters are to be preferred according to the priority of their arrestments and their diligences thereon, albeit some of the arrestments were laid on before the term of payment of the debt arrested; as also, that they are to be preferred according to the dates of their arrestments and diligences, where the term of payment of the debts on which arrestments are used, are past at the time of the competition; notwithstanding, that at the time of laying on the arrestments, the terms of payment of some of the arresters debts were not come, or notwithstanding, some of the arrestments were on dependencies, which were closed, and the debts liquidated before competition. Home, 2d January 1728, competition betwixt Watkins and Wilkie.

In a competition betwixt two arresters, the one upon a dependence, the other upon a bill of exchange; the Lords preferred the arrestment upon the bill, tho' the bill did not bear *value received*, but only *value in accompt*, because, such a bill creates a valid obligation, and has

parata executio ; but found, That the arrester must instruct that he is creditor to balance, and that his preference is to be restricted to the balance not exceeding the sum in the bill. 15th February 1729, Campbell *contra* Hog.

ARRESTMENT before the term of payment, upon dependence upon a conditional debt, &c. See Legal diligence.

ARRESTMENT in security. Ibid.

ARRESTMENT upon an obligation not registered. Ibid.

ARRESTMENT makes the subject litigious. See Litigious.

ARRESTMENT at the market cross of Edinburgh, pier and shore of Leith. See Bona fide payment.

ASSIGNATION.

Assignment
not intimate
denudes not.

THE cedent is not denuded by his assignment without intimation, and intimation cannot be considered barely as giving preference in competition, but truly as a step of diligence necessary to complete the right in the assignee's person. Stair, 22d January 1663, Wallace *contra* Edgar. ——— Therefore, before intimation the debtor is in safety to make payment to the cedent. Forbes manuscript, 8th June 1714, Ld. Freugh *contra* Ld. Fullarton. ——— An assignment intimated before the cedent's decease, is sufficient warrant and title to raise letters of horning, poinding, comprising, &c. at the assignee's instance, without transferring the debt or bond registrate. Durie, Hope (*Assignment*) 3d February 1624, Ld. Craigmiller *contra* Stevenson. ——— Otherwise, if not intimate during the cedent's life. Durie, 23d January 1624, Stevenson *contra* Ld. Craigmiller. ——— An assignee craving, That a process might go on in his name, the cedent in whose name it was raised being dead, in regard the assignment was intimated at the market cross before his decease, tho' neither intimated personally, nor judicially produced ; the Lords found, That it must be transferred. Fountainhall, 29th January 1687, M'Ilwraith *contra* Rig and Lessels.

THE Lords found the registration of a bond by an assignee after the creditor the cedent's death, was informal, tho' the debtor was alive ; because registration is a decret of consent, which requires an actor and a reus, and here the actor was dead, and so there could be no decret at his instance ; and it was not sufficient that it was done by an assignee who had not intimated his assignment in the cedent's life ; for tho' it be payable to the creditor and his assignee, so is it likewise to his heirs and executors ; and yet they could not summarily registrate. Fountainhall, 16th February 1693, Channel *contra* Sir Walter Seaton. See act 26th Parl. 1690.

AN affignation of a reverſion without intimation, annailzies not. What rights are eſtabliſhed by affignation, without neceſſity of intimation. Colvil, February 1587, Diſhington *contra* Ld. Lochnoris.----And therefore, in double affignations made of the ſame reverſion, he was preferred who firſt uſed the order of redemption. Colvil, December 1589, Diſhington *contra* Porteous, ----- A tack of tiends being affigned to the heritor himſelf, the affignation was found effectual in a competition from the date, it requiring no intimation. Stair, 27th July 1673, Montgomery *contra* Montgomery. The like, Stair, 14th December 1676, Earl of Argyle *contra* Ld. M^c Donald. --- Affignation of a contract of wadſet, was found to eſtabliſh the right in the aſſignee's perſon, ſo as to entitle him after the cedent's death to uſe requiſition againſt the debtor, without neceſſity of any intermediate ſtep of diligence. Durie, 6th March 1639, Urquhart *contra* Barclay.

A SIMPLE retroceſſion without intimation, evacuates an affignation not intimate. Dirleton, 20th November, Stair, 2d December 1674, Craig *contra* Wedderlie. Simple retroceſſion ſufficient, where the affignation is not intimate.

AN aſſignee who had granted a back-bond of truſt, after intimating his affignation, conveyed the ſame to the cedent's creditor, with the cedent's conſent. This was found an implement of the truſt, and the right thereby fully eſtabliſhed in the creditor's perſon, for ſecurity of his debt, without neceſſity of a new intimation at his inſtance. Upon which footing he was preferred to a donatary of the cedent's ſingle eſcheat, who had obtained general declarator before intimation of his right. Forbes, 5th December 1712, Smith *contra* Stirling. An affignation in truſt being intimated, a conveyance to the cedent's creditor needs not be intimate *de novo*.

AN aſſignee may purſue in the cedent's name, even tho' he diſclaim the proceſs. Hope (*Affignation*) 20th November 1621, Grier *contra* Maxwell. Aſſignee may purſue in the cedent's name.

AN inſtrument of intimation of an affignation was rejected, becauſe it neither bore the claufe *de cujus procuratoris mandato mihi liquide conſtabat*, nor (which would have ſupplied it) was there any procuratory extant, tho' at the diſtance of twenty five, or twenty ſix years. Colvil, 24th January 1577, Bruce *contra* Smith. ----- In a competition betwixt an arreſter and an aſſignee, the aſſignee's intimation was found null ; becauſe, the ſame perſon who was procurator, was alſo nottar thereto. Durie, 3d July 1628, Scot *contra* L. Drumlanrig. ----- Of two aſſignies to one ſum, the one having firſt perfected his affignation by intimation, but the intimation labouring under ſome informalities, ſuch as, That it contained not precisely the ſum in the affignation, that it made no mention of the cedent, nor of the date of the affignation, nor of the *cauſa debendi*, but only related to letters of ſupplement in general ; ſo that it might be applied to any other right as well as this, not being write on the back of the affignation, but on a paper apart, tho' copies were affixed on the market croſs, and intimation perſonally made to the debtor's curators ; the Lords found, Whatever this intimation might operate againſt the common debtor, yet, that now in a competition with a co-aſſignee, for an onorous cauſe, it was too general and uncertain ; they therefore preferred the other competitor. Fountainhall, 17th June 1696, Laurie *contra* Hay. Formalities of an inſtrument of intimation.

Intimation,
by what equi-
valents suppli-
able.

WHERE intimation is necessary as a solemnity, the party concerned, tho' insert as a witness in an instrument of intimation, was found thereby not to be put in *mala fide*, but only by a formal intimation. Colvil, June 1586, Mackalzean *contra* Mackalzean. The like where he was made witness to the affignation. Haddington, November 1622, Murray *contra* Durham. See also, Haddington 11th January 1611, Graham *contra* Livingston. Durie, 15th June 1624, Adamson *contra* M'Mitchel. Durie, 14th March 1626, Ld. Westraw *contra* Williamson. In all which, private knowledge was not sustained. See also Fountainhall, 29th November 1679, Bayne *contra* Cunningham, where a letter write to the debtor was found not a sufficient intimation. But a letter written by an assigney to the debtor, with his answer, craving days for payment, was sustained as a sufficient intimation, *idque contra tertium cessionarium*. Hope, Spotiswood (*Affignation*) Durie, 22d January 1630, M'Gill *contra* Hutchison. ----- An assigney to a ticket, having first by letter signified his right, and thereafter shewing the debtor the affignation, without any further intimation by a nottary, and the debtor nevertheless thereafter paying to the cedent; there being here no competition among creditors, but the question only being betwixt the assigney and the debtor, the Lords found the payment unwarrantable, and that it could not defend him against the assigney, tho' no legal intimation was made, there being no co-creditor in the field. Fountainhall, 16th February 1703, Leith *contra* Garden. ----- In a competition betwixt an arrester and assigney; the Lords preferred the former, tho' the assigney alledged, That upon shewing the affignation to the debtor, he had promised payment; but this they found only probable *scripto*, to exclude the arrester; nay, even as to the debtor, they found, That the said promise could not bind him, being made in contemplation of a right supposed to be in the assigney's person, and that being found invalid, it was unreasonable he should pay twice; and here the Lords thought, That the assigney *sibi imputet*, that he had not completed his right. Dirleton, 11th December 1674, Home and Elphinston *contra* Murray. ----- Found, That a ratification of an affignation by the debtor, was not equivalent to an intimation. Durie, 27th January 1624, Stevenson *contra* Ld. Craigmiller. ----- Yet a few weeks thereafter, a debtor his treating with the assigney several times, anent the payment to him as assigney, and offering to him some satisfaction for the debt, was sustained as a sufficient intimation. Durie, ult. March 1624, Ld. Dunipace *contra* Sandis. ----- A communing with a debtor was found not to supply the want of intimation, seeing a promise of payment was not alledged. Dalrymple, 25th July 1718, faculty of advocates *contra* Sir Robert Dickson. ----- In a competition betwixt a prior assigney and posterior arresters of the same sum, the assigney pled preference upon a private notification given to the debtor's factor, who had accordingly, by a memorandum in his compt-book, mentioned the said affignation; which memorandum was urged equivalent to a formal intimation, as inferring the debtor's knowledge of the conveyance. It was contended on the other hand by the arresters, *imo*. That in point of relevancy nothing which is extrajudicial can supply an intimation, but what implies the debtor's undertaking an obligation to the assigney. *2do*. In point of proof, That, in competition, the debtor's undertaking such obligation can only be proved by a formal writ, or by

by the competing arrester's oath of knowledge. *3tio*. An intimation made to a factor was never reckoned equivalent, as if made to the debtor himself. The Lords found, That the private notification made to the factor, and entred in his book, is not equivalent to an intimation to the debtor; and therefore preferred the arresters. 30th July 1729, Earl of Aberdeen and creditors of Merchiston competing.----- In a competition for a Lady's liferent-annuity, some of her second husband's creditors having formal assignations thereto duly intimated, and another producing a bond granted to him by the said second husband, and the heir of the first husband, containing in corroboration an assignation to the same annuity, the Lords preferred this creditor, and found no need of any other intimation but the heir's subscribing the writ, which sufficiently supplied it. Forbes, 28th March 1707, competition creditors of Lord Ballenden.

AN assigney to a woman's liferent, getting decret of removing against the tenants, was found preferable to prior assignies, whose assignations were not intimate. Nicolson (*Assignation*) 21st January 1624, Lord Elphinston *contra* Ord:----- In an action for registration of a bond, the defender alledging, that he had paid the cedent before intimation of the assignation, the Lords found, That the summons of registration being execute against the defender before the payment made to the cedent, it was a lawful intimation. Haddington, 22d March 1622, White *contra* Neish.----- The Lords found a disposition to a Lady's jointure sufficiently intimated, so as to exclude an arrester, that either the tenants were cited at the assigny's instance, to make payment to him of their rents, or that the disposition was produced in the baron-court, and intimated to the tenants; altho' the decret given thereupon against them was thereafter turned into a libel. Home, December 1681, Ogilvie *contra* Ogilvie.

Intimation
by process.

PAYMENT of annualrent to the assigney is equalent to an intimation. Nicolson (*Annualrent*) 16th November 1626, Livingston *contra* Lindsay.

Intimation
by payment
of annualrent
to the assigney.

ASSIGNATION to mails and duties. See Competition.

GRATUITOUS discharge made by the cedent after Assignation. See Bankrupt.

BONA fide payment made to the cedent, where the assignation is intimate, but not personally to the debtor making payment. See Bona fide payment.

B A N K.

IN a case betwixt the two banks, it was found, That neither horning, inhibition, nor arrestment, were competent against the Old Bank, upon their notes or tickets, the diligence being done *in emulationem*. 11th July 1728, Royal Bank of Scotland *contra* Old Bank.

R

BANK-

BANKRUPT.

And first, Reduction of Alienations made by Bankrupts, where the Reducer has done no Diligence.

Onerous alienations not reducible upon this head of the act,

FOUND, That as a creditor might take payment from his debtor, altho' *in meditatione fugæ* (and in the present case upon the same day that he fled) so he might also take assignation to debts for his payment, seeing no other of the creditors had done any sort of diligence against the common debtor before his assignation. Durie, ult. January, and 1st February 1627, Scougall *contra* Binning.----- A disposition granted by a notour bankrupt was not reduced upon the act 1621, at the instance of the other creditors who had done no diligence, the disposition being in satisfaction of a bargain of victual sold and delivered to the bankrupt about a month before the disposition. Stair, 20th July 1671, Ld. Birkenbog *contra* Graham.----- A confident person being pursued upon the act 1621, by an onerous creditor whose debt was prior to the disposition granted to the confident person, it was not found a good defence, That the disposition was applied to satisfy a debt of the bankrupt's, the debt being granted *in lecto*, which was known to the defender, and therefore presumed gratuitous. Stair, 3d February 1672, Home *contra* Bryson.----- A disposition to a brother for satisfying debts resting to himself, and those for which he stood bound as cautioner, and to pay off such other creditors as he should think fit, was only found valid as to his own debts and cautionries, and to fall under the act 1621 as to the others. Gosford, 6th January 1669, Newman *contra* Preston.----- The Lords (in a case that fell out before the act of parliament 1696 touching bankrupts) refused to reduce heritable rights granted by a party to some of his creditors, tho' he was alledged, by the other creditors pursuers, to have been bankrupt at granting. Fountainhall, 25th November 1696, creditors of Campbell *contra* Lord Newbyth.----- An heritable bond of corroboration being granted by an eldest son in fee of the estate to some of his own and his father's creditors, and another creditor contending, that tho' the granter was not notour bankrupt by the marks given in the act of parliament 1696, yet that, at granting, he was materially bankrupt, in so far as he was insolvent and *oberatus* above the value of his estate, the Lords found, That the receiver of the corroborative security, not being a confident person to the granter, the right he received from him could not be reduced on the head of mere insolvency, where the granter was not under diligence, nor retired, nor had the other marks contained in the standard made for bankrupts by the said act of parliament. Fountainhall, 13th July 1698, Moncrief *contra* Lockhart.

Unless they be alienations *omnium bonorum*.

EVEN before the act of parliament 1696, it was frequently found, That a notour bankrupt was tied up from any considerable or total alienation to any of his creditors in prejudice of the rest, tho' none of them had done diligence; which was not so much from the statute 1621, as from the nature of the thing, that bankrupts should not have

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it in their power to gratify one creditor at the expence of another, which is a plain act of injustice. Dirleton, 23d July, Stair, Gosford, 18th December 1673, creditors of Tarperfy *contra* Ld. of Kinfauns.---- The like, Stair, 29th June 1678, Cranston *contra* Wilkie. Stair, 14th November 1679, Pollock *contra* kirk-session of Leith.---- Thus a party having granted to two of his creditors (when there was no diligence raised against him by any man) a disposition *omnium bonorum*, for satisfying their debts, the Lords, upon application of a third creditor, found, That by such a general disposition he became bankrupt; and therefore, that all the three should come in *pari passu*. Falconer, 10th February, Home, March 1685, Brown *contra* Watson and Drummond.---- And an uncle having taken a disposition from his nephew, of his whole estate, and that not for a price told down, but in satisfaction of anterior debts, whereby the nephew became utterly insolvent, and incapable to perform his other engagements, this was found to be fraudulent, and the disposition was reduced *ad hunc effectum*, to bring the creditors in proportionally to their sums. Stair, 18th January 1678, Kinloch *contra* Blair. --- A debtor against whom no diligence was done, having granted a disposition *omnium bonorum* to one of his creditors in security and payment, and another creditor having arrested in the disponee's hands, and in a furthcoming insisted, that the disposition was null, and that he was preferable by virtue of his diligence, the Lords reduced *ad hunc effectum*, to bring him in *pari passu*, and repelled the *jus retentionis* pled for the disponee; for, if the disposition was unlawful, the disponee could have no just title to retain possession. 25th February 1737, Cramond *contra* Bruce and Henry.

A PERSON insolvent, but against whom no diligence was done, having made a disposition in favours of his near relations, for security and payment of debts owing to them, neglecting his other onerous creditors, this disposition was found fraudulent, and therefore was reduced. Fountainhall, 28th January 1696, Scrimzour *contra* Lyon.--- The contrary had been found, Durie, 2d February 1632, Jack *contra* Gray. Durie, 17th January 1632, Skeen *contra* Betson.

WILLIAM INNES factor to the Dutchess of Buccleugh, having fallen in considerable arrear, granted a disposition to her Grace of particular subjects for her security and payment of the balance. It was objected against this disposition by the granter's other creditors, That it was virtually a disposition *omnium bonorum*, tho' it contained no general clause of *all goods and gear*, because the debtor's whole effects were therein comprehended. Answered, There is a great difference betwixt dispositions bearing to be *omnium bonorum*, and a disposition to any particular subject, supposing the granter should not be found to have any other estate; the granter of an universal disposition makes and declares himself bankrupt by the very tenor of the deed, which hath the same effect in law *quoad* the acceptor, as if the granter had been judicially declared bankrupt before, or notourly made so by a course of diligence; whereas every true creditor is in *bona fide* to accept from his debtor, against whom no diligence is done, any of his effects, either in security or payment: This objection was repelled.

December 1728, Dutchess of Buccleugh *contra* Sir James

Sinclair and Mr. Patrick Doul.---- A disposition by a tenant of *the corn cropt upon his possession, and all and baill his horse, nolt and sheep, and other goods and gear, of whatever kind, pertaining and belonging to him*, was found a disposition *omnium bonorum*, it not being alledged, that he had any debts due to him by bond or bill, or any heritable subjects. 25th February 1737, Cramond *contra* Bruce and Henry.

Gratuitous
alienations re-
ducible.

A PARTY having granted a gratuitous disposition of lands, this was thereafter reduced at the instance of a creditor of the disponent's, altho' at granting he was a man of entire credit, nor was there any diligence raised against him, only, he broke a little after granting the disposition. Durie, 16th February 1628, Kilgour *contra* Thomson.---- A gratuitous disposition, reserving the granter's liferent, and a faculty to sell a part of the land for payment of debt, was reduced at the instance of a prior creditor who had done no diligence, to this effect only, That the pursuer might affect the land with legal diligence for his debt, as if the disposition had not been granted; for seeing, by this disposition, there remained no fund sufficient *ad paratam executionem*, the Lords thought there was no reason to put the pursuer to insist upon the fore-said faculty, and to restrict himself thereby to a part of the lands, but that he ought to have preference upon the whole land, according to his diligence. Stair, 6th February 1663, Ld. Lourie *contra* Earl Dundee. --- A reversion being granted in a disposition to the disponent's heirs alienarily, himself being *operatus*; the Lords thought, That if the price were not adequate, (which was to be tried) a reduction of the disposition at the instance of creditors ought to be sustained, and access allowed to them to comprize the reversion. Dirleton, Gosford, 5th January 1677, Earl Glencairn *contra* Brisbanes. --- A disposition *omnium bonorum*, by a wife to her husband, bearing for love and favour, and for onerous causes, was not sustain'd to compete with an anterior obligation for an annuity granted by the disponent to her aunt. Forbes, 24th July 1706, Weemyss and White *contra* Murray.

What if the
granter was
solvent at the
time of the
gratuitous ali-
enation.

GRATUITOUS alienations not reducible upon the act 1621, if the debtor became not thereby insolvent. Home, 11th December 1717, creditors of Meldrum *contra* Kinnier. Durie, 5th March 1629, Lady Borthwick *contra* Goldilands, Durie, 6th March 1632, Ld. Garthland *contra* Ker.---- But a gratuitous assignation to a conjunct person a few days before the granter's death, was reduced at the instance of a creditor of the defunct's, confirming the same subject, tho' it was offered to be proven, That the common debtor was solvent at the time of granting; it being more just, to oblige the conjunct person to be at the trouble and expence of seeking out the defunct's hidden funds, than the onerous creditor. Fountainhall, 7th December 1710, Daes *contra* Fullarton. --- In support of a gratuitous alienation made by a debtor, who at the time of reduction was a bankrupt, it was found relevant, That when he made the alienation, he had a sufficient visible estate to pay the pursuer, and all his other creditors. Stair, Dirleton, 30th June 1675, Clark *contra* Stewart. --- A gratuitous alienation was sustained, and found not reducible by onerous creditors, if the disponent had then a visible estate sufficient for all his debts, whether by infeftments, moveables, or bonds, tho' *ex eventu* he proved insolvent. Stair, 10th November 1680, M'Kell *contra* Jamieson. Sir Patrick Home,

Home, December 1681, M'Kell *contra* Calendar. — The Lords found, That if a debtor had a visible unincumbered estate at the time of his disposing to his sister, and her husband, more than would have paid all his debts, the disposition could not be annulled on the act 1621; especially considering, That, in the present case, the pursuer of the reduction was in *mora*, not having adjudged the lands for seventeen years after the disposition. Forbes, 11th, Fountainhall, 15th January 1712, M'Kenzie of Prestonhall *contra* Fletcher. The like, Forbes, 17th June 1712, Ker *contra* Scot.

In the computation of a separate estate, the Lords refused to reckon any heritage which was tailzied with clauses irritant, and which the common debtor could not dispose of for payment of his debts. Forbes, 29th July 1712, Ker *contra* Scot. — But, where a person had exhausted his land-estate by gratuitous infestments, it was not sustained to bar reduction, that the granter had a sufficient personal estate at the time of granting, it being hard to oblige the creditors to expiscate and hunt after a latent moveable estate. Marcus (*Bonds*) 20th July 1688, children of Mousewall *contra* Duke of Queensberry. — In a like case, the Lords first reduced the disposition, unless it were proved, That the father disposer left a visible estate, not in personal bonds or money (for that may be daily altered) but in heritable rights sufficient to pay the pursuer's debt; but they altered this afterwards, and only required a visible estate *quomodocunque*. Fountainhall, 10th November 1680, Calendar *contra* M'Kell.

In a reduction upon the act 1621, of provisions granted by a father to his children, the question being, Whether the father had a sufficient estate at the date of these provisions? The fact was, That his estate was burdened with two liferents, which subsisted above twenty four years thereafter, whereby the funds came, *ex eventu*, to fall short, and not sufficient to pay all the debts; the Lords would not sustain the burden of the liferents *secundum eventum*, but as they were worth when the bonds were granted to the children, and estimated the liferent of the elder to five, and of the younger to seven years purchase; by which account the father had free above 30000 pounds Scots when he granted the bonds of provision to his children; and therefore they sustained the said provisions. Stair, 11th December 1679, creditors of Mousewall, *contra* the children. — But thereafter, the Lords altered this interdictor, and found, That liferents, in this case, should be reckoned according to the full time they had run, and if they were still subsisting, some further consideration for the time they might run thereafter. Marcus (*Decrees*) March 1684, *inter eosdem*. — And lastly, in the same case, the liferents being run out when the cause was still in dependence, they were computed according to the full time they had subsisted. Marcus (*Bonds*) 28th July 1688, *inter eosdem*.

A SECOND assignation being first intimated, the Lords nevertheless found it reducible upon the act 1621; the first being an anterior debt by the warrandice of the assignation, and this, tho' both the first and second were lucrative, and gratuitous assignations. Fountainhall, 11th December 1695, Blair *contra* Austin. Stair, 15th July 1675, Alexander *contra* Lundies. Fountainhall, 7th February 1699, Hay

What understood a sufficient separate estate, to bar reduction.

Liferents, how to be computed in this case.

Second gratuitous alienation of the same subject, reducible at the instance of the first, tho' the granter be not insolvent.

contra Hayes. ----- A cedent after granting assignation, cannot gratuitously discharge the debt, tho' before intimation. Stair, 3d February 1671, Blair *contra* Blair. ----- A first disposition with last infestment for onerous causes, prefer'd to a second gratuitous disposition of the same subject first infest. Stair, 23d July 1662, Lord Fraser *contra* Philorth. The like, Forbes, 24th January 1706, Wilson *contra* Lord Saline.

Provision in
favour of a
wife, how far
onerous.

A BOND granted after marriage for a suitable liferent to a wife by her husband insolvent at the time, was sustained, when quarrelled by creditors after the husband's death, and she allowed to come in proportionally with them, altho there was neither contract of marriage nor tocher given, and altho' the creditors bonds were anterior to the relict's, seeing her's was *de jure naturæ* due. Durie, 19th June 1635, Walker *contra* Polwarth. ----- A husband, during the marriage, having given a liferent provision of his whole estate in lieu of a contract of marriage, whereby his prior personal creditors were like to be defrauded, at least postponed till after the death of the liferentrix, tho' the subject then would be sufficient to pay all the debts; the Lords found this infestment reducible, in so far as exorbitant, and found the same valid, only, in so far as competent for such persons, according to the condition of the husband's estate and the wife's tocher. Gosford, Stair, 19th January 1676, Stansfield *contra* Brown. ----- A husband during the marriage having infest his wife in an annuity of 72 pounds Scots a year, upon a narrative that she was not otherways provided: In a reduction after the husband's decease, at the instance of his prior creditors, upon the first branch of the act 1621, it was pled for them, That tho' a husband is naturally bound to provide his wife in a jointure, this obligation ceases by his insolvency equally with the obligation to aliment her during the marriage. *2do*. At any rate a liferent provision, granted in the circumstances of insolvency, ought never to exceed a *rationalis tertia*, which the present does. To the first answered, Tho' the obligation upon a husband to provide his wife in a jointure, cannot be made the foundation of a process at common law, it is yet a *debitum naturale* which he is bound to fulfill, and there is no law to bar him from applying his effects to this purpose, as well as towards the fulfilling of his engagements to any other of his creditors, seeing the doing justice to one creditor, in preference to another, is in the power even of a bankrupt who is not interpellated by diligence; and the law in this case makes no distinction betwixt creditors, whether more or less onerous; and therefore, the liferent infestment must stand as not being a gratuitous deed, unless the creditors could say further, That it was done with a view to prefer the wife to the other creditors, so as to found a reduction upon the head of fraud, of which there is no presumption in the present case. To the second answered, If the liferent were immoderate, it would be reducible *quoad excessum*, and restricted to a *rationalis tertia*; but where the estate is so small that the terce is not sufficient for a moderate aliment, there is no reason for making it a rule; the Lords found the provision in question granted to the wife after marriage, there having been no precedent contract, a rational and onerous deed, and therefore does not fall under the act 1621, 11th January 1738, Robertson *contra* Handyfide. ----- In a marriage-contract, the husband by a personal obligation provided

provided his wife to a jointure of 180 pound Scots yearly, and also to the sum of 1000 pounds Scots failing children of the marriage ; during the the marriage he infest his wife in a tenement of L. 10 Sterling of yearly rent, bearing, " To be over and above any former provision made " in favours of his spouse. " The husband having died insolvent, his creditors raised a reduction of this infestment, upon the first head of the act 1621, as being gratuitous ; the relict acknowledged she could not hold both the personal provision and infestment, but observed, That the case would be hard, if the creditors, who had cut her out of her personal provision by preventing her in diligence, should be allowed to turn these provisions against her, in order also to cut her out of her liferent infestment ; and therefore answered, That as a reasonable provision granted *stante matrimonio* to a wife not otherwise provided, would be effectual, tho' the husband were insolvent at the time ; so the present infestment, tho' designed as a gratuity, coming out to be no other than a reasonable provision, is not reducible ; gratuitous it cannot be said to be with regard to the relict, who throws up every other claim against the husband and his creditors ; the Lords found the wife's infestment is not reducible upon the act 1621, 17th February 1738, Sir Roderick M'Kenzie of Scatwel *contra* Christian Monro.

A WIFE having assigned the price of lands to her husband by contract of marriage, in name of tocher, which he recompensed with suitable provisions to her and the children of the marriage ; the Lords found the assignment not reducible upon the act 1621, at the instance of an anterior creditor. Forbes manuscript, 22d January 1714, Lockhart *contra* Dundaffes.

In a competition betwixt two apprifers, one of them upon a bond of provision, it was found relevant to prefer the other apprising led by an onerous creditor, that the delivery of the bond of provision was posterior to the onerous debt. Stair, 22d July 1668, Johnston *contra* Arnold. — A son *in familia* getting a disposition of lands for love and favour ; and having thereafter made voluntary payment to several of his father's creditors ; the Lords found, That it might be reduced at the instance of his stepmother upon her contract of marriage, altho' no diligence was done by her to put him in *mala fide*, to pay debts which were contracted after her liferent provision, seeing, being a son in *familia*, he could not miss to be in the knowledge of her right. Gosford, 24th June 1670, Home *contra* Bryson. — In a reduction upon the act 1621, at the instance of prior creditors, against bonds of provision granted to children ; this defence was found relevant, That the father had sufficiency of estate at the time of granting these provisions, to satisfy both them and his former debts. Gosford, 5th, Stair, Dirleton, 6th January 1677, children of Mousewall *contra* his creditors. Stair, 11th December 1679, *inter eosdem*. — The Lords sustained bonds of provision, tho' the father was under burden, if solvent. Fountainhall, 7th February 1679, Hamilton *contra* Hay. — Innergelly having given a bond of provision to his children, whereon infestment followed after his death, the Lords reduced the bond at the instance of anterior creditors, tho' the father was not bankrupt at the date of the bond ; but the bond had remained latent during the father's life. Marcus (*Bonds*) February 1688, Sir Philip Anstruther *contra* children of Innergelly. — In a competition betwixt a de-

funct's creditors and his daughter, for a sum in a bond which he had taken payable to him and her, the longest liver, and their heirs and assignies, the Lords found the daughter simply preferable to the creditors whose debts were contracted posterior to the date of the said bond, and preferred her even to the anterior creditors, unless they would alledge, that the father was insolvent the time of his decease, when her fee began: For they thought, That parents might give provisions to their children, unless they were either impeded by creditors diligence, or actual insolvency. Fountainhall, 12th January 1697, creditors of Kinfauns *contra* Carnegy. ----- A father filling up his son's name in a blank bond, and delivering the same to him, his posterior insolvency will be no cause of reduction. Fountainhall, 11th February 1697, Campbell of Cefnock *contra* Murray of Blackbarony. ---- Found, That a party having disposed his estate to his eldest son, with the burden of divers provisions to his other children, the father's creditors might be heard against these provisions, either as latent or undelivered; or that fathers cannot burden their estates with sums of money payable to their children, till their lawful creditors be satisfied, at least, that they must have a considerable visible estate, sufficient to pay at the time of settling these provisions. And found, That the father's condition might be enquired into, whether insolvent at that time, yea, or not. Fountainhall, 9th February 1700, Edmiston *contra* Countess of Rothes. ----- A wife was provided to the liferent of her husband's whole means, but, in the case of children, she restricted her self to the half, and renounced the remainder in favours of the children. This was found not sufficient to prefer the children to creditors whose debts were before the contract of marriage, seeing the creditors had no other fund of payment during the relict's life. Stair, 23d December 1679, Erskine *contra* Carnagies. ----- A wife who brought a tocher of 2000 merks, being provided to a liferent of 300 merks a year, but with this quality, That, in case of children, she should renounce 100 merks a year in their favours, it was found, That the jointure here was but suitable to the circumstances of the parties, and therefore, that the renunciation in favours of the children was not to be presumed a fraudulent contrivance, in order to cover this provision to the children from anterior creditors; and therefore, the children were preferred in a competition. Fountainhall, 1st July 1703, Reid *contra* Whitson.

Provisions
made in con-
tracts matri-
monial, how
far onerous.

A BANKRUPT, before his insolvency was known, having contracted a jointure to his son's spouse, the Lords refused to restrict the jointure, and found her provision onerous and suitable, her tocher having been 8000 merks, and the jointure 2000 merks, restricted also to L. 100 Sterling, in case of children of the marriage. Dalrymple, Bruce, 17th February 1715, creditors of Mr. John Menzies *contra* Dr. Menzies and his Lady. ----- A person insolvent became bound in his nephew's contract of marriage, amongst other provisions, to pay the wife a yearly annuity of 2000 merks, to commence after the husband's decease, in security of which he infeft her in certain lands. The granter's creditors raised a reduction of this alienation upon the act 1621, alledging it to be *ultra vires* for the granter to make voluntary alienations of his effects, in prejudice of his prior lawful creditors. The Lords refused to sustain the reduction, the said liferent-provision being onerous as to the wife,
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in so far as, upon the faith thereof, she had entred into the marriage-contract. 18th November 1729, Creditors of Sir David Thoirs *contra* the Lady Middleton. ----- But a father, while in prison, and commonly reputed bankrupt, having made an assignation to his son-in-law, which, being in place of a tocher, was pled to be directly onerous, the daughter at her marriage not being otherwise provided; yet the Lords found the same reducible; for the marriage having been contracted while the father was in these circumstances, it was nothing a kin to the case, where the father is in entire credit; so that the son-in-law, in this case, accepting of a provision with the spouse, in a contract of marriage, or otherwise, must be understood to run the hazard of all the father's debts. Stair, 23d November 1680, Wood *contra* Reid. ----- The Lords found an assignation by a father to his son, in his contract of marriage, reducible at the instance of the cedent's creditor, upon the act 1621, as a gratuitous deed *inter conjunctos*, unless the son could instruct, that his father had then a sufficient separate unincumbered estate for paying all his debts, seeing the assignation (tho' in a contract of marriage) was nowise conceived in favours of the wife, or children of the marriage, but simply to the conjunct person, his heirs and assignies. Forbes, 3d July 1712, Hepburn *contra* Lord Strathnaver. ----- A man in his first contract provided the children of the marriage to 25000 merks, and in his second contract he provided the children thereof to 36000 merks; at which period he had sufficiency to answer the whole provisions; but at his decease, his funds falling short, the Lords reduced the provisions in the second contract, in so far as prejudicial to the provisions made to the children of the first marriage, there being still a competency remaining to the children of the second marriage. Forbes, 22d June, Fountainhall, 26th June 1711, Aikenheads *contra* Aikenheads. ----- But thereafter, in a ranking of creditors, the Lords allowed the children of the first and second marriage of the common debtor, who were provided to sums in their respective mothers contracts, to come in *pari passu* proportionally, effecting to their respective sums. Bruce, 6th July 1715, Lady Achinvoile *contra* her step-daughter. ----- A father, at his son's marriage, having given 40000 pounds Scots, tho' the father was at that time solvent, the Lords, upon his eventual bankruptcy, sustained action against the son, at a creditor's instance, to make so much of the L. 40000 forthcoming as would satisfy his debt: For it was thought, That debtors ought not to have it in their power to prejudice their creditors by such extravagant gratuities, whereby, tho' perhaps they are not rendered directly insolvent, the creditors are greatly harmed, by losing most part of their security. Stair, 8th February 1671, Wat *contra* Campbell. ----- A man who in a second contract had provided the children of the marriage to the fee of 6000 merks, thereafter disposed to his eldest son by his first wife, in that son's contract of marriage, two tenements, valued about 3000 merks, which proved to be most of his substance, burdening the same with L. 1000 Scots to the children of the second marriage; the Lords found the deed gratuitous *quoad* the eldest son and his children, and reducible *in totum* upon the act 1621. 12th June 1730, Cock *contra* Cock.

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FOUND,

This reduction reaches *adquerenda* as well as *acquistita*.

FOUND, That a debtor granting disposition, in favours of a conjunct person, of some heritage and moveables he had fallen heir to, and not being able otherwise to pay his debts, the same fell within the act against dyvours. Durie, 17th January 1632, Skeen *contra* Betson.

Who reckoned prior creditors.

IN a reduction upon the act 1621 of a gratuitous bond, as being after contracting of lawful debt, the question occurred as to bargains, merchants compts and furnishing, whereof the probation and decreets of constitution were after the gratuitous bond; the Lords found debts constitute by witnesses to be effectual from the time of contracting, to take away any posterior deed of the debtor done without a cause onerous, and not only from the time of probation or sentence. Stair, 21st January 1669, creditors of Pollock *contra* Pollock. ----- In a reduction upon this act, the debt pursued upon was a bond bearing merchant-ware, dated after the gratuitous right, the Lords found, That the quantities, and times of furnishing, might be proved by witnesses; and albeit there had been a discharge of the ware upon granting the bond, yet so much thereof as was furnished before the gratuitous right would affect the same. Stair, 27th July 1669, Street *contra* Mason. ----- A gratuitous disposition reduced at the instance of a prior onerous creditor by an imply'd warrandice, tho' the decreet establishing the debt, upon incurring the warrandice, was not till after the disposition. Stair, 28th November 1679, Cathcart *contra* Glafs. ----- In a declarator of bankrupt, the Lords refused to sustain the presumption, that the acceptance of the bill was of the same day's date with the bill it self, unless it were otherwise proven. And found, That the pursuer, who had only produced an accepted bill as his title, was not creditor to the bankrupt till acceptance; and which acceptance, being posterior to a disposition, the bankrupt had granted to other creditors, they found the pursuer had no interest to quarrel the same, unless he could astruck and fortify his bill by some grounds of debt owing to him by the bankrupt prior to the same. Fountainhall, 25th July 1702, Man *contra* Walls and others.

This reduction, if good against singular successors.

A REDUCTION of a gratuitous right upon the act 1621 is sustained against singular successors in the right, where the right bears to be gratuitous; in which case, singular successors, tho' paying a price, cannot pretend to acquire *bona fide*. Stair, Gosford, 6th February 1672, Hay *contra* Jamieson. See Durie, 11th July 1637, Robertson *contra* Brown. ----- A disposition by a man to his brother-in-law found null by the act of parliament, unless the cause onerous were instructed: And in a reduction against an onerous purchaser from the brother-in-law, the Lords obliged the onerous purchaser to instruct the onerous cause of the disposition betwixt the conjunct persons. And found, That he was not secured by the clause in the act of parliament, in favours of purchasers *bona fide* from intrusted persons, which did not extend to a purchaser knowing his author to be a conjunct person, as did appear, in this case, from the very tenor of the disposition. Stair, Fountainhall, 24th January 1680, Crawford *contra* Ker. ----- Tho' participation of fraud mentioned in the act 1621 be not confined to him solely who is upon the contrivance and design of defrauding the creditors, but is extended to singular successors purchasing from conjunct and confident persons;

yet

yet it is not sufficient to reduce the purchaser's right; that he knew his author's relation to the bankrupt; unless he was also in the knowledge of the bankruptcy; because there is no law to bar a man in good circumstances from disposing even gratuitously to his near relations: And because knowledge is *animi*, it must be presumed from circumstances, the most pregnant of which is, That he was generally held and reputed bankrupt. Fountainhall, 28th November 1693; Spence *contra* creditors of Dick. — A disposition to a conjunct person, bearing for security of a sum owing to him by the granter, who was solvent at the time, having never been quarrelled for 58 years, the Lords found, That a singular successor to the receiver of the disposition was not obliged to prove the onerous cause thereof, otherwise than by the narrative, in a competition with anterior creditors of the granter, when his estate had proven insufficient to pay his debts. Forbes, 2d February 1711; Guthry *contra* Gordon. — William Sangster having disposed a tenement in Aberdeen, narrating an onerous cause, to Charles Sangster, who happened to be his brother, Charles disposed the same over again to his daughter and her husband in their contract of marriage, but without making mention that the subject was derived to him from his brother William. A great number of years thereafter, action of reduction upon the act 1621 was intended of these dispositions, by a prior creditor of William Sangster's, libelling, That the disposition from William to Charles being betwixt conjunct and confident persons, must be presumed gratuitous; and that therefore, Charles's daughter and her husband, who knew of the said conjunction, tho', in the eye of law onerous purchasers, can be in no better case than their author. The defence was, That it was extreme likely the daughter and her husband knew of the relation betwixt William and Charles Sangsters; but, at the same time, there was no sort of evidence of their knowledge that Charles's right was derived from his brother William, without which they were in *optima fide* to purchase; and, unless this knowledge be proved, they can never be brought in as *particeps fraudis*. The Lords, in respect there was no evidence that the defender was in the knowledge that Charles Sangster's right flowed from William Sangster his brother, therefore they assolized from the reduction. 9th January 1730, Allan *contra* Thomson. — A disposition by a man to one designed in the writ to be his brother-in-law, and bearing to be for a certain sum of money, being challenged by the disponent's creditors, the disposition being *inter conjunctos*, was found not to instruct its onerous cause; and the receiver's creditors having adjudged the disposition, they were found to be in no better condition than the receiver himself, seeing the conjunction was expressed in the disposition. Forbes, 15th June 1710, Lesly *contra* creditors of Lesly. — As a second gratuitous disposition of the same subject cled with the first infestment is reducible at the instance of the first, tho' the granter have funds *alieunde* sufficient to pay his debts; so the reduction was also found to have place against the second disponent's creditors who had adjudged the estate from him, in respect the second disposition was from a father to his son, and bore to be gratuitous. January 1723, Lyon *contra* creditors of Easterogle. — One having disposed lands to his third son, in the disponent's contract of marriage, and thereafter disposed the same lands to his second son with the burden of debts; in a competition betwixt the first disponent and an onerous purchaser from the

the second disponee, both craving adjudication in implement of their dispositions; the Lords found the long latency of the first disposition, sufficient to prefer the onerous purchaser, who had bought *bona fide*, thus far to make up his just and true interest, but not to give him any advantage by the bargain; and therefore, adjudged in his favours, under reversion to the first disponee upon payment of what was truly wanting to the onerous purchaser. Stair, 16th July 1675, Campbell and Riddoch *contra* Stewart. ----- One having disposed a land-estate to his son-in-law, the disposer's creditors, at the distance of above forty years, brought a process of reduction, upon the act 1621, against a singular successor who had now right to the lands, upon this medium, That the disposition, being to a conjunct and confident person, must be presumed gratuitous; and the defender, tho' an onerous purchaser, can be in no better situation, seeing the connection betwixt the parties appeared *ex facie* of the conveyance; the Lords abstracted from the defence of prescription, seeing there were some traces of interruption, and found, That the singular successor, at such a distance of time, was not bound to instruct the common debtor's solvency when he granted the disposition to his son-in-law, not even so much as that he was then holden and reputed solvent. Fountainhall, 23d December 1692, Spence *contra* creditors of Dick.

Alienation after Diligence.

What sort of deeds reducible upon this head of the statute.

THE real creditors of a bankrupt having taken infeftment on their former precepts of sasine, after the bankruptcy, and even after the personal creditors had charged with horning; the Lords found, That there did not arise any hypothec or *jus reale* to the personal creditors on the common debtor's becoming bankrupt, so as to impede real creditors to infeft, &c. notwithstanding the charges of horning before completing their rights by infeftment, seeing the act 1621 discharges only voluntary rights after diligence inchoated; but here, the debtor had given the heritable bonds before, and nothing hindered the real creditors to infeft *quandocunque*. Fountainhall, 16th December 1696, creditors of Hunter competing. ----- An eldest son who had become bound for some of his father's debts, and, upon that account, forced to retire to the Abbay, was charged to enter heir by his father's other creditors, and gave in a renunciation *intera annum deliberandi*, upon which adjudications were laid: Upon this the creditors to whom the son was personally bound, and who had also adjudged the estate upon special charges, insisted in a reduction of the adjudications led by the other creditors; contending, That the bankrupt ought to have made use of his privilege of deliberating for year and day, if which had been done, the defender's would not have come in within year and day of the pursuer's, and as he was then incapable to grant any voluntary right, a voluntary renunciation was of the same nature. Answered, If the bankrupt had made use of his privilege, the law would interpret it to be collusive, done with a view to disappoint his father's creditors; the Lords assilzied from the reason of reduction. Fountainhall, 15th July 1697, creditors of Hunter competing.

A BANKRUPT having granted assignation to one of his creditors, in prejudice of another, who had done more timeous diligence by horning, &c. the prior creditor having affected the subject assigned, by taking a gift of escheat, was found to have action of repetition against the assignee obtaining payment. Stair, 11th November 1675, Veitch *contra* Pallat. ----- A master having procured a disposition from his tenant, for payment of a preceeding year's rent, that fell not under the hypothec, after the tenant was denounced at the horn by another creditor, and the master having obtained *bona fide* payment by virtue of the said disposition; the Lords found, That he could not be liable to repete what he had received, more than he if had pointed, altho' the creditor who first had done diligence would have been prefer'd in a competition. Forbes, 9th July 1709, Lady Rickerton *contra* Gibson. --- Denunciation with insolvency, not a sufficient foundation to reduce posterior payments made by the common debtor, unless at the same time he had been commonly reputed a bankrupt. Dalrymple, Bruce, 7th June 1715, Tweedie *contra* Din.

Payment, if challengeable.

NOTWITHSTANDING of diligence, a bankrupt may sell his lands for a price presently told down; because such alienations are no partial gratification of one creditor in defraud of another. Stair, 8th February 1681, Neilson *contra* Ross. --- And may also grant bond for borrowed money. Stair, 28th June 1665, Montieth *contra* Anderson.

Contractions or alienations where money is instantly advanced, not reducible.

A PARTY being *oberatus*, and standing registred at the horn before he granted a disposition now quarrelled, the Lords found this not sufficient, unless they would conjoin with it that he was then *oberatus* and bankrupt, one horning not being sufficient for that. Fountainhall, 12th February 1686, Cockburn *contra* creditors of Grange Hamilton. --- In a reduction at the instance of a creditor of one who was alleged *oberatus* the time of granting rights corroborative to other creditors, in so far as their rights were granted after the debtor was charged with horning by the pursuer, but before denunciation thereupon, which followed not for several months after charging; the Lords sustained the pursuer's reduction, he proving the debtor's insolvency at that time, tho' his condition was not then so propalled as to make him holden and repute a notour bankrupt, the standard being but lately fixed by act of parliament, containing, a notour bankrupt's marks and description. Fountainhall, 19th November 1697, Miln *contra* creditors of Nicolson.

Reduction not sustain'd unless the common debtor became insolvent by the alienation.

THE Lords reduced a disposition because of an inhibition, altho', 1st. The inhibition was not registred. 2dly. It was by virtue of a factory prior to the inhibition, and so depended on an anterior cause. 3dly. Tho' it was done *autore pratore*, the lands being roup'd by order of the Lords; but here the party was bankrupt at granting the disposition. Fountainhall, 13th January 1697, Elphinston *contra* Henderson. --- The suspension of a charge in the year 1649, at the instance of one Lyell against Sir William Dick, not being discussed, by reason of the war and interruption of justice, till 1652, and then the charger having proceeded, without denouncing, to apprise in the year 1653, and to raise inhibition which was executed and registred in 1654; Sir William assigned a moveable bond to one Mowat, of which assignation Lyell raised reduction.

Inchoat inhibition, if sufficient to found the reduction.

duction as being a gratification after her diligence ; alledged for the defender, That the charge on which denunciation and registration did not follow, was not sufficient diligence to hinder the assignation ; and the real diligences cannot be regarded, seeing they affect not moveables. *2do.* 'Tis not sufficient that diligence was inchoat, seeing the creditor was in *mora* to consummate the same : Answered, Where a debtor is bankrupt, any diligence is sufficient to hinder him to make a voluntary preference among his creditors, and there was no negligence in the pursuer to prosecute his diligence by reason of the war and surcease of justice ; the Lords sustained the apprising as a sufficient prior diligence, and found a formal inhibition a due diligence, to hinder gratification out of moveables. *Harcus, (Alienation) 25th November 1687, Mr. Hugh Dalrymple advocate contra Janet Lyell. -----* A creditor having executed an inhibition against Sir Walter Seaton his debtor personally upon the first of February, published it at the market cross of Linlithgow upon the fourth, and registred the same upon the sixth day ; the debtor, upon the second day of the said month of February, subscribed a minute of sale of his lands to another creditor, which was quarrelled, both as a gratification of one creditor after inhibition at the instance of another, contrary to the act 1621, and anticipation of the inhibitor's diligence when he was *in cursu*. Answered, The inhibition was not registred till four days after the minute, and diligence is only to be considered after it is publick by registration ; the Lords reduced the minute as a gratification to a creditor and unlawful anticipation of another's diligence. *Harcus (Inhibition) Fountainhall, 16th March 1686, Gartthoar contra Cockburn.-----* An inhibition raised against two conjunct debtors, and executed against one of them, was found sufficient, upon the second clause of the act 1621, to reduce a disposition granted by the other in prejudice of the inhibitor who was *in cursu diligentiae*. *Fountainhall, 9th January 1696, Brown contra creditors of Kennet.*

Charge of
horning, if a
sufficient foun-
dation.

AFTER horning against a common debtor, a disposition made by him not being for a price paid by way of commerce, but for satisfying a prior debt, was found reducible at the creditor's instance doing prior diligence. *Stair, Fountainhall, 25th January 1681, Bathgate contra Bowden. -----* A person having sold his lands to two different purchasers, it was found, he having become insolvent by the two minutes of sale, That after horning against him at the first purchaser's instance upon his minute, he could not, by gratification, extend the second minute, and grant infestment to the second purchaser, which was in prejudice of the first purchaser's diligence ; and the horning was found to have a general effect, both as to lands and moveables. *Stair, 18th July 1677, Murray contra Drummond.* The Lords considering, That a charge of horning is a foundation for affecting either the personal or heritable estate of the debtor, and that a charge of horning satisfies the terms of the act 1621 ; therefore they sustained a simple charge of horning as sufficient to reduce securities granted afterwards to other creditors, the common debtor's insolvency at the time being proven. *Fountainhall, 19th November 1697, Mill of Carridden contra Nicolson's creditors. -----* A charge of horning being given without proceeding further, and then the debtor assigning a subject that was moveable, and after the assignation the party being denounced, and the horning registrate, tho' none of the marks of a bankrupt mentioned

ed in the act 1696 was alledged to be found on the debtor, yet the Lords found, That the assignation fell under the compass of the act 1621, against rights in defraud of anterior creditors, unless the assigney would prove, That, at the time of the debtor's granting the assignation, he was holden and repute solvent. Fountainhall, 24th February 1709, the bank of Scotland *contra* Kennedy. ----- This reduction again sustained upon an unregifted horning. Forbes, 23d February 1709, Hamilton and M'Kenzie *contra* Campbell.

Two creditors having charged, and the first charger obtaining assignation from the common debtor, intimate before the other creditor's arrestment, was found preferable, because this was not a preference given to one creditor in prejudice of the more timely diligence of another. Stair, 20th November 1677, Bishop of Glasgow *contra* Nicholas. ----- One being first charged, at the instance of his wife's friends, to provide her in a liferent in terms of the contract of marriage, and thereafter by another creditor, his disposing a bond to his wife in part implement, was found not reducible upon the second head of the act 1621, seeing it was granted in favours of the creditor who had done most timely diligence. Fountainhall, 14th January 1703, Deans *contra* Hamilton. ----- The Lords found, That a party having received a voluntary assignation from his debtor in security of bygone debt, and by virtue thereof recovered the sum assigned, might, notwithstanding, after the debtor's decease, legally confirm the said sum, as executor-creditor to him, and by the confirmation support the assignation quarrelled upon the act 1621, at the instance of a co-creditor insisting for repetition. Forbes, 22d December 1709, Henry *contra* Glaffels and Coning. ----- A debtor's disposition to a creditor who had charged him after he had been charged by another, being quarrelled as a gratification, it was answered, That the disposition being granted in obedience to a charge, cannot be reputed a voluntary gratification. Replied, That such a disposition cannot prejudice the more timely diligence of a creditor who was not *in mora*; which reply the Lords found relevant. Marcus, (*Alienation*) November 1688, Young *contra* Murray.

This reduction, if competent against other creditors having done diligence.

In a reduction of a disposition of goods upon the act 1621, at the instance of a creditor who had done diligence, the Lords preferred the pursuer, and refused to allow the assignies, who were also creditors, to come in *pari passu* with him. Home, February 1687, Chaip-land and Beatman *contra* Hamilton. ----- In a reduction upon the act 1621, the Lords found, That the common debtor could not prefer one creditor to another, after diligence done against him by horning, in prejudice of these creditors at whose instance the horning or diligence was used; and therefore reduced such a disposition, as being simulate, *ad hunc effectum*, to bring in all the creditors *pari passu* together, who had used horning, or other diligence against the debtor before the granting of the disposition: But found, That the diligence used by the creditors did not accresce to the other creditors who had done no diligence, so as to give them likewise the benefit of the act of parliament, and to bring them in *pari passu* with these creditors, at whose instance diligence was done, or even with these in whose

Effect of this reduction.

favours the disposition was granted ; and this because in the present case, the common debtor was not latent nor fugitive, but continued to keep shop and use merchandise after granting of the disposition. Falconer, 11th January, Home, March 1682, Cunningham *contra* Hamilton.

This reduction reaches *acquirenda*, as well as *acquisita*.

THE Lords found, That this act extends as well to *acquirenda* as to *acquisita*, and that a debtor cannot dispoise lands or heritable rights acquired after the creditor's diligence by inhibition or horning, in prejudice of that creditor's debt and diligence, and therefore, they reduced such a disposition. Home, November 1683, Dempster *contra* Morison.

If the creditor-reducer has been in *mora*.

IT was found, That after diligence by horning, the common debtor, who was bankrupt, could not grant any voluntary right in prejudice thereof ; and this tho' the creditor had lain over twenty years without prosecuting his diligence. Stair, 12th February 1675, Veitch *contra* executors of Ker. — A party *oberatus* having made a general disposition *omnium bonorum*, the Lords reduced the same, in so far as it prejudged such creditors as had charged him with horning before the date of it, tho' he was neither denounced nor registred then, and one of them seemed in *mora*, in forbearing to denounce for a month thereafter. Fountainhall, 21st January 1686, creditors of Drummond competing. — One having charged his debtor without denouncing for four months after, and having taken a disposition after the charge, before which disposition, but after the charge, another creditor having charged, and denounced and quarrelled the disposition, the Lords reduced the disposition as a voluntary gratification, the first charger having been negligent in delaying so long to denounce. Marcus, (*Alienation*)

November 1688, Young *contra* Kirk. — The Lords refused to reduce a disposition to a creditor upon the act 1621, as made in prejudice of the anterior diligence of horning used by another creditor who had denounced the common debtor at the market-cross of Edinburgh, and registrate at the horn, in respect the denunciation was not duly executed at the cross of the head burgh of the shire where the debtor lived ; nor any other diligence used after the horning, for several years, to affect either the debtor's heritage or moveables. Forbes, 28th March 1707, Gordon *contra* Duff. — A person insolvent having, after he was charged with horning at the instance of one of his creditors, granted a voluntary assignation to another, in security of a debt contracted before the charge, the Lords refused, at the instance of the user of the horning, to reduce the assignation upon the act 1621 ; because he had been in *mora*, in completing his diligence by denunciation for five months thereafter, or thereby. Forbes, 9th July 1709, Drummond *contra* Kennedy and Reid.

Reduction of preferences granted by means of interposed persons.

ONE Kirkpatrick having disposed his lands irredeemably to Lag, who obliged himself, by a back-bond, to denude upon payment of sums advanced and to be advanced by him, and of debts he should acquire, a creditor of the disponent's inhibited him, and comprised the back-bond. Lag, in a pursuit for mails and duties, craving to be preferred for some debts he had acquired, it was alledged for the other, That the acquisition was a gratification, being posterior to his inhibition. Alledged for

for Lag, That he being impowered by the back bond to acquire debt, was not concerned with the inhibition, it not being executed against him, or intimated to him before the acquisition. The Lords sustained the inhibition relevant to hinder gratification made by Lag, after the inhibition was executed against Kirkpatrick. *Harcus, (Alienation)* 28th June 1688, *Gardner contra* Ld. of Lag. — In a reduction of a disposition of lands upon the act 1621, as granted by a bankrupt after diligence, the defence was, That the purchaser had paid the full price to creditors, as he was taken bound to do in the disposition; the defence was sustained, the payments having been made *bona fide* before intending this reduction, reserving to the pursuer action of repetition, as accords, against the co-creditors who had received payment. *Home, February 1682, Neilson contra* Ross. — In a similar case, the disponent having paid debts after intending a reduction of his right, the Lords refused to sustain these payments; but they found the defender, even after reduction was intended, might pay any debt he had undertaken to pay before. *Harcus, (Alienation)* 8th December 1682, *Grant of Kirdells contra* Birkenburn.

Decisions upon Act 5th, Parliament 1696, for declaring notour Bankrupts.

THIS act has no retrospect. *Fountainhall, 16th December 1696, creditors of Hunter of Muirhouse competing.* Has no retrospect.

In a competition betwixt two creditors of a bankrupt, the Lords inclined to think, That the bankrupt's flying within 60 days, did not annul a voluntary right granted by him within the said space of his breaking, unless there was horning and caption against him before the said voluntary deed, *Fountainhall, 15th February 1698, Gray contra Baird, —* The pursuers having proven, That within the 60 days of the disposition, a messenger came with a caption to the debtor's house, who seeing the messenger, did retire and hide himself, so that the messenger having searched could not find him; the Lords found, not only, that this short absconding, within 60 days after the disposition, did fall under the act of parliament, but also that one single horning and caption was here sufficient; so that there was no need of a concurrence of diligence against him. *Fountainhall, Dalrymple, 8th February 1705, creditors of Clelland competing. —* Horning and caption upon general letters, found sufficient to infer notour Bankruptcy, joined with the other circumstances in the act. *Dalrymple 24th July 1702, Man contra* Wales. — In a process upon the act 1696, the question occurred, Whether a horning or caption, labouring under a legal objection, is, notwithstanding, sufficient to render the debtor notour bankrupt? The objection was, That the horning was executed at the debtor's dwelling-house, tho' he had removed out of the kingdom about a fortnight before; whereas it ought to have been at the market-cross of Edinburgh, pier and shore of Lieth. Answered, It is sufficient there be a horning and caption; neither the meaning nor the words of the law require, that the diligence be above all exception; and a horning or caption, tho' challengeable by one or other ground of law, is sufficient to make the bankruptcy notour, equally as if no exception lay against it. And the

construction put upon the act by the other party, would open a door to elide the act altogether; a bankrupt would have no more ado, but, upon making over his effects to his favourite creditor, to step over to the other side of the border, and rest secure that his fraudulent deed must stand unexceptionable, because a horning executed on 60 days, must come too late to bring the deed within the retrospect of the statute. Replied, *Esso* the horning and caption in this case, should be sustained to infer one of the qualifications of bankruptcy; yet the other is wanting, *viz.* flying or absconding for his personal security; now the debtor's retiring out of the kingdom, possibly, about his necessary affairs, before any diligence done against him, can never come up to the qualification of "flying and absconding for personal security" which must presuppose diligence already raised, to shun the effect of which, the debtor finds it convenient to keep out of the way. Duplied, The act does not presuppose diligence done; a bankrupt who retires to avoid the effect of diligence ready to be raised, and which is morally certain will be poured out against him, is as properly said to fly or abscond for his personal security as if diligence were already raised; the Lords found the horning and caption produced relevant to infer one of the qualifications of the act 1696, notwithstanding of the objection made against it. 24th February 1737, Lord Kilkerran *contra* Couper.

Flying or
absconding
without insol-
vency, will not
infer notour
bankruptcy.

IN a question about the interpretation of the 5th act of parliament 1696, and for fixing a period when a party is to be reputed insolvent, in order to quarrel his voluntary infestments, *viz.* whether at the time of the granting, or as his estate is burdened with increasing annualrents, penalties, and accumulations, at the time when he is declared by the Lords decret to be bankrupt? the Lords found, That the computation must be as the state of his debt and fortune was at the time of his retiring, incarceration, &c. and if his effects and estate were better than his debt at that period, the infestments he had given within the sixty days would not be reduced and annulled, tho' *ex post facto* his estate came to be overburdened with diligences. And found, That in the computation no more was to be reckoned but the principal sums and annualrents then owing, with such penalties as were then incurred; but that neither annualrents falling due thereafter, nor penalties incurred by hornings posterior, nor accumulations arising on diligences led after it, were to enter into the computation, *quoad hunc effectum*, to annul the heritable securities he gave at the time of his breaking, so as to make him insolvent at that period. Fountainhall, 5th, Forbes, 4th January 1712, real and personal creditors of Monimusk competing.

What sort of
alienation falls
under the fan-
ction of the
act.

AN inland bill accepted payable to the drawer, indorsed to a third party for value received, was found reducible by the act 1696 anent bankrupts, because the indorsation was not for present value paid in by the indorsee, but in security or payment of a debt formerly due by the indorser. Dalrymple, Forbes, 16th January 1713, Campbell *contra* Graham.—— The like, Fountainhall, 2d February 1700, Durward *contra* Wilson.—— A notour bankrupt having assigned a bond to a trading company for ready money, and having applied some part of the price for payment of a private debt due by him to one of the company, and it being contended, that this was truly a voluntary assignation for satisfaction of a creditor; answered, The assignation was

to

to the company for ready money, and not reducible, and payment thereafter out of the price made to one of the company, was the same as made to any third party; and therefore effectual, unless it could be said, that actual payment is reducible upon this act: This case was found not to fall under the act 1696. 25th January 1733, Buchanan *contra* baillie Arbuthnot.

A DEBITOR, within sixty days of his bankruptcy, delivered to one of his creditors, lint, dales, &c. in payment and satisfaction *pro tanto*. Against a reduction upon the act 1696, it was pled, That the act reaches not moveables, the commerce of which ought to be free; the Lords found the reduction relevant to oblige the defender to restore the goods or the value. 19th July 1728, Smith *contra* Taylor. The like. Dalrymple; 27th January 1715, Forbes of Ballogie *contra* debtors of Forbes.

Delivery of moveables in satisfaction of debt.

A VOLUNTARY disposition for a price paid, and not for anterior debts, falls not under the acts 1621 and 1696. Bruce; 1st January 1717, Burgh *contra* Gray.

A purchase for ready money not reducible.

THE narrative of an assignation by a bankrupt, bearing money instantly advanced, it was put to the assignee, Whether it was not in security of a prior debt? He declared, That when he lent his money, it was covenanted that he should have the assignation as part of his security; but when the money was lent, and the bond written out, the assignation was not ready, but that it was delivered to him about a week thereafter. The Lords found this assignation fell under the sanction of the act of parliament. 4th February 1729, Eccles *contra* creditors of Merchiston.

What understood a purchase for ready money.

AN apparent heir having granted infestments of annualrent, did thereafter grant a procuratory to serve himself heir, that his infestment might accresce to the annualrent-rights. In a competition betwixt these annualrenters and posterior adjudgers, it was objected against the procuratory, That it was granted while the common debtor was a notour bankrupt, and therefore null by the act 1696; the design of which act is to annul every partial preference granted by a bankrupt, *directly* or *indirectly*, in favours of creditors. It was answered, That the act mentions only *alienations* made by the bankrupt, and reaches not to every deed which may any way be attended with a consequential damage or benefit to some of the creditors. The Lords preferred the annualrenters. February 1728, creditors of Graitney competing.

If deeds are challengeable where nothing is given away, but yet a partial preference effectuated.

ONE having purchased an estate, and taken a conveyance to his author's disposition, with procuratory and precept, and having thereafter been concerned in the rebellion 1715, his friends, while he was prisoner in England, thought proper to infest the author, in order, if possible, to protect the estate from the government. The gentleman returning home without being attainted, contracted several debts, and conveyed to some persons from whom he borrowed money his author's precept for their security, not knowing that the same was exhausted, and infestment taken upon it in the author's person: At last, having died bankrupt, these creditors adverting to the mistake, applied to the author, and obtained infestment from him, which be-

Partial preference granted by means of an interposed person.

ing quarrelled upon the act 1696, as granted by a trustee after the common debtor's notour bankruptcy, it was answered, The author was not here a trustee; the conveyance did not denude him of his personal right to the estate; he might have infest himself, and made a second conveyance in favours of another; and it is no objection, that he has exercised his power in favours of the bankrupt's creditors; nor can it alter the case, that infestment was taken in his name without his knowledge; this does not make him a trustee for the common debtor; he cannot be put in a worse situation without his consent; and therefore might lawfully use the infestment taken in his name, as if taken by himself for his own behoof. The Lords found the infestments granted by the author not reducible upon the act 1696. 21st June 1737, Beaton of Kilconquhair *contra* M^c Kenzie of Frazerdale.

Effect of
this reduction.

A DISPOSITION by a bankrupt to a creditor being reduced on the act 1696, and that creditor having done no diligence (as others had done by arresting) trusting to his disposition, the Lords found the disposition so far simply null, that it could not even subsist to bring him in *pari passu* with the others. Fountainhall, Dalrymple, 2d December 1704, Man *contra* Reid. — The like, 19th July 1728, Smith *contra* Taylor. — A disposition by a bankrupt to some of his creditors was found null *ab initio* upon the act 1696, and was not sustained as a title to the bygone rents *in medio* at the sentence of reduction. Forbes, 8th February 1706, Hamilton of Wishaw *contra* creditors of Cleland.

Disposition by a Bankrupt in favours of his whole Creditors.

A DEBTOR having disposed his estate in trust for payment of his creditors, it was found, That the trustee ought to make payment to the creditors *legittimo modo*, and not to these who had done no diligence in prejudice of the diligence of others. Stair, 24th July 1669, Crawford *contra* Anderson. — In a case that occurred before the act 1696, where a bankrupt against whom the creditors were *in cursu diligentia*, after retiring to the Abbey, executed a disposition in favours of his whole creditors, upon which infestment was taken; this was argued to be no partial gratification, but a fair and honest deed, beneficial to the creditors, and saving them the expence of diligence, and so not reducible upon the act 1621. Answered, We are not here to consider a seeming equality introduced amongst creditors; but the precise ground in law is, That no deed of a bankrupt *postquam cessit foro*, and the creditors *in cursu diligentia*, can subsist; but he must leave his estate to be affected with diligence, and the creditors will be preferred accordingly, without regard to the disposition; and here the Lords are in use to make a difference betwixt one insolvent, and a bankrupt; where no diligence is done, a debtor may dispoise his estate to his whole creditors, tho' his debts exceed his effects; but not where he is known to be a bankrupt, and diligence inchoat against him. The Lords found, That the common debtor being a notour bankrupt at the time of granting the disposition, the same was null in law, and could not defend against the adjudgers. Fountainhall, 9th

9th January 1696, Smart *contra* creditors of Drysdale.----- Disposition by a bankrupt to his whole creditors, equally and proportionally, where no partial favour is done, but each preferred according to his diligence, is not reducible upon the acts 1621 and 1696. Home, 17th November 1725, competition creditors of Watson *contra* Muirhead. 15th July 1726, competition of Eymouth's creditors. ----- A bankrupt disposing upon a subject, took the bond for the price payable to his creditors, with this special provision, *That the creditors should accept of certain funds in full of all their debts.* Before the creditors their acceptance, arrestments were used in the hands of the debtor of the bond; and, in a competition, the Lords preferred the arresters, specially upon this medium, That the bond was conditional, depending upon the creditors their acceptance; but if the bond had been simple, and equally to all the creditors, the Lords would have preferred the creditors tho' the bond had been taken in their names after the debtor's notour bankruptcy. 3d July 1724, creditors of Watson competing. ----- A disposition by a bankrupt to trustees in favours of his whole creditors, was sustained, notwithstanding a prior charge of horning, and the trustees preferred to the charger. July 1729, competition Farquharson and creditors of Cumming. ----- The contrary found, 28th January 1735, Mansfield *contra* Brown and Stobo. ----- A bankrupt having granted a disposition of his whole effects to certain trustees for the behoof of all his creditors, in a reduction of the same, upon the act 1696, the reasons were, That a bankrupt was disabled from granting such a right, tho' not directly in preference of one creditor to another, yet indirectly, by putting all upon an equal footing, the most remiss with the most vigilant. 2do. The trustees were of the bankrupt's own naming, and his nearest relations, and these trustees are invested with most unreasonable powers, such as, To adopt creditors or not at their pleasure, to divide the price of the effects among the creditors, without being liable to any check, they being impowered so to do as arbiters, and in that capacity to determine also the expences of managment, it is also declared, That they shall not be made liable for omissions; and lastly, That there is a forfeiture upon the creditor, who should quarrel or impugn the right granted to these trustees, or who should use separate diligence; the Lords found the reasons of reduction relevant, and, at the same time, laid hold of this opportunity to declare their sentiments against all such dispositions in general, and in that view caused insert the following clause in their interlocutor, *And further find, That no disposition by a bankrupt debtor can disable creditors from doing diligence.* 12th July 1734, Snee and company *contra* trustees of Michael Anderson. The like found 3d February 1736, Earl of Aberdeen *contra* trustees for the creditors of Blair.

A BANKRUPT having granted a disposition *omnium bonorum* to his creditors for their security and payment; one of them not satisfied with the common fate, insisted in an adjudication against the bankrupt, which was strenuously opposed by the others, foreseeing this adjudication would be used as a foundation for pushing on a sale of the debtor's estate, which would heap a multitude of expences upon them, and tend in the general, to render of no effect the method that has of late been fallen upon of granting dispositions *omnium bonorum*; they pled, That this was an invidious diligence, that in all events their disposition must be preferable, whereby it will be impossible for him to make

more by the adjudication than he has already by his right in the disposition; and therefore, there was the same reason for stopping this diligence that there is for stopping arrestments and inhibitions, which is done every day upon equitable considerations; the Lords refused to stop the adjudication. January 1729, Mr. James Chyne *contra* the trustees of Merchiston's creditors.

Decisions upon the clause, act 1695, declaring heritable Bonds, &c. to be, as if granted of the date of the sasines taken thereupon.

If this clause concerns *nova debita*.

THE question occurring with relation to an heritable bond, granted for ready money, sometime before the bankruptcy, but whereupon sasine was taken within the sixty days, whether this case fell under act 5th parl. 1696? The Lords found, That the bond was to be considered as of the date of the sasine; and found, That the sasine, being taken within the sixty days, was void and null as to the point of bankruptcy, without prejudice to the personal obligement in the bond. Dalrymple, 29th January and 12th December 1717, Grant *contra* Duncan. ----- The contrary found, That the act 1696 anent bankrupts reaches only securities given for former debts, not *nova debita*. Home, 19th January 1726, Chalmers *contra* creditors of Rickarton. ----- But thereafter, in a case fully debated, where an heritable bond was granted, *anno* 1721, for money instantly advanced, upon which infeftment was not taken till December 1727, within sixty days of the debtor's notour bankruptcy; the Lords found, That this bond, dated so long before the bankruptcy, fell under the act 1696, and that the clause of the said act, making the securities to be considered as of the date of the infeftments, was not introduced in favours of the creditor infeft, to make his bond still be considered as a new debt then contracted of the date of the infeftment, but was introduced altogether in favours of the other creditors, and *in pœnam* of him who kept up his precept of sasine latent, and therefore found, That the bond is only to be considered as a personal security. 19th June 1731, creditors of Merchiston *contra* Colonel Charteris. ----- The like found, where the heritable bond was dated, June 1727, and infeftment not taken till April 1729. 25th November 1735, Trustees of Matheson's creditors *contra* Smith. ----- In a similar question, where the common debtor having right to an heritable bond, without infeftment, upon a third party's estate, had conveyed the same to one of his creditors, who neglected to take infeftment till within sixty days of the common debtor's notour bankruptcy, the Lords found, That this case did not fall under the act; because whatever might have been the intent of the statute, the words respect only the cases where infeftment is necessary to denude the bankrupt, and when it goes this length it has a most valuable effect, and cannot by construction be extended further than the words will bear. January 1734, creditors of Scot of Blair *contra* Charteris of Ampsfield.

Date of the sasine is the rule, not of the registration.

SASINE being taken more than sixty days before the notour bankruptcy, but the same being registered within the sixty days, it was contended, That this brought the disposition within the clause of the act, declaring dispositions, heritable bonds, &c. whereupon infeftment is taken "within

" within threeſcore days of the bankruptcy, ſhall only be reckoned " as granted of the date of the ſafine." The Lords found, That the date of the ſafine, not of the registration, muſt be the rule; and therefore repelled the reaſon of reduction. Dalrymple, Bruce, 17th February 1715, creditors of Mr. John Menzies *contra* Dr. Menzies.

Compare Ceffio bonorum, under Prisoner.

BANKRUPTCY receivable by reduction or exception. See *Competent*.

ALIENATION in favours of a conjunct or confident perſon, what evidence requiſite of its onerofity. See *Proof*.

WHO underſtood conjunct perſons. *Ibid*.

PROVISIONS granted in favours of children or other relations, when underſtood fraudulent, ſo as to be reducible upon that head by creditors. See *Fraud*.

BASE INFESTMENT.

A BASE infestment not null for want of poſſeſſion, albeit excluded by a publick infestment before poſſeſſion. Stair, 16th January 1663, tenants of Kilchattan *contra* Lady Kilchattan. ----- How far effectual without poſſeſſion. Good againſt the granter and his heirs, tho' neither regiſtered nor cled with poſſeſſion. Home, 26th January 1726, Marquiſ of Clydesdale *contra* Earl of Dundonald. ----- Without poſſeſſion, is ſufficient to exclude the terce; for, as to the huſband's heir or relict, it is a ſufficient right. Stair, Goſford, 27th January 1669, Bell *contra* Lady Rutherford.

A BASE infestment was preferred to a publick one, as being prior, because there being no more than a year ſince the date of either, the baſe infeſter had, immediately after the firſt term, intended action, whereby he had done all lawful diligence to make his right publick, ſince before the term he could have no action for annualrent. Durie, 13th February 1624, *contra* ----- Preferred as of its date, if poſſeſſion is inſiſted in ſine mora. The ſame found in a competition betwixt an annualrenter and a feuer of the lands, where both infestments were baſe, and the latter had attained poſſeſſion, but the former had done all proper diligence to attain it. Durie, 2d July 1625, Ld. Raploch *contra* tenants. ----- The like, Stair, 26th July 1676, Aliſon *contra* Carmichael. ----- A baſe infestment being taken 28th June 1655, and a publick infestment on a comprizing taken the very next day thereafter, in the queſtion about the preference, the comprizer alledging, that the baſe infestment could not be clothed with poſſeſſion till the Martinmas thereafter, and that there was a *medium impedimentum interveniens*; and the baſe infeſter alledging, that the act 105, parl. 1540, againſt baſe infestments, was only to take place

where they were simulate, which this was not, and offering to prove, that it was clothed with possession at the Martinmas first subsequent to the sasine, which was as soon as could be, so that he was not in *mora*, the Lords sustained this as relevant to prefer the base infestment. Home, November 1686, Fountainhall, 25th January 1687, Ramsay *contra* Kinloch. ----- A base infestment of annualrent being granted, to take effect after the granter's death, upon which a decreet of poinding the ground followed during the granter's life, this decreet, upon which possession could not follow, as being before the term of payment, was sustained to make the base infestment publick, so as to compete with other publick infestments. Stair, Gilmour, 27th February 1662, creditors of Kinglassy competing. ----- A tenant obtained from his master an infestment of annualrent out of the lands before Whitsunday; but the first term's payment of the annualrent was Martinmas thereafter. Betwixt Whitsunday and martinmas, a creditor apprises the land, charges the superior, and thereupon insists for mails and duties. It was argued, That the annualrent was cled with possession before the apprising, in respect that the annualrenter, by virtue of his tack, was in the natural possession from the very date of his sasine; and that *intus habuit*, since he did retain his own annualrent which became due from the date of the sasine *de momento in momentum*; so that as the getting payment from the possessor of any part of the annualrent, would be a sufficient possession, the annualrenter retaining the same in his own hand as possessor is equivalent, which was found relevant. Stair, Gilmour, 30th June 1666, Stevenson *contra* Dobbie.

Process of
mails and du-
ties, or poind-
ing the
ground, mak-
it publick.

A DECREE of poinding the ground against the tenants and possors, tho' the heritor was not called, found sufficient to validate a base infestment. Stair, 15th June 1666, Sir Robert Sinclair *contra* Ld. of Houston. ----- Base infestment found validated from the date of the citation for poinding the ground. Stair, 26th June 1662, Wilson *contra* Thomson. Stair, 27th January 1669, Bell *contra* Lady Rutherford. Stair, 24th January 1679, Hamilton *contra* Seaton. ----- The bare execution of a summons of mails and duties is sufficient to make a base infestment publick. Fountainhall, 16th July 1700, creditors of Langton competing. ----- And the citation of a few tenants was found as sufficient as if the whole had been cited, for all the baronies contained in the base infestment, tho' distinct and not united. Marcus (*Infestment*) 9th December 1691, ranking of creditors of Lanton. ----- A man having given infestment of annualrent furth of his lands to a conjunct person, to be holden of himself, altho' the party raised letters for poinding of the ground, yet no possession having followed upon the infestment, a stranger buying the land thereafter, was found to exclude the annualrenter, who was in *mora*, and never attained natural possession. Haddington, 19th June 1605, Douglass *contra* Douglass.

Confirma-
tion makes it
publick.

A BASE infestment of property, cled with possession, preferred to a base infestment of annualrent, tho' confirmed by the King before possession was attained upon the former, in regard the confirmation could not make the infestment publick, because it was given to be holden of the granter only, and not of the superior. Durie, 17th November

1627,

1627, L. Clackmanan *contra* Burn. ----- The like, penult. January 1628, *inter eosdem*. ----- A confirmation in exchequer is not a complete deed till the seal be appended; and therefore, a base infestment made publick by citation in a poinding of the ground was preferred to another infestment confirmed before it, and sealed only about an hour after the citation. Marcus (*Infestment*) 9th December 1691, Fenton *contra* Lockhart of Carnwath.

FOUND that a base infestment is clothed with possession by payment of the annualrent to the creditor divers years, tho' not paid out of the lands affected, nor by the tenants, but personally by the granter. Durie, 18th July 1626, Lady Glengarnock *contra* Ld. Kilbirnie. Durie, 11th February 1642, Monteith *contra* Ld. West-Nisbet. ----- The Lords found a base infestment sufficiently clothed with possession, by a discharge, bearing only receipt of the annualrent of the personal bond, but having no relation to the heritable right on which the *fasine* followed, and being paid out of other lands than these out of which it was upliftable. Fountainhall, 21st February 1696, creditors of Cunnochie *contra* Malcolm. ----- The receipt of a small sum, far within a term's annualrent, was found to validate a base infestment of annualrent, tho' it did not specify the infestment, and tho' there was more than that sum due of annualrent upon the personal bond, before the date of the infestment. Stair, 23d July 1667, Home *contra* Home. ----- A party being infest in an annualrent base, and, before he attained possession, another having adjudged, but the infester getting an year's annualrent before the adjudger was publickly infest, the Lords preferred the annualrenter. Home, January 1682, Nisbet *contra* Carmichael. ----- An heritor having paid an year's annualrent to a base infester, and taken assignation thereto, the Lords found this equivalent to a discharge, he being heritor and possessor of the *fundus* which was properly debtor in the annualrent; and here their Lordships thought that any thing was sufficient to clothe a base right with possession among strangers, seeing the 105 act, parl. 1540, levels only against alienations made among near friends, and where there is ground to suspect simulation. Fountainhall, 20th December 1695, Lady Badinscoth *contra* Falconer. ----- Payment of a term's annualrent of a bond, whereupon *fasine* did not follow till after the payment, was found to make it publick, *quoad* a donatary of life-rent escheat, whose right was posterior. Gosford, 14th January 1669, Clarkson *contra* Mill; 6th February 1669, *inter eosdem*. ----- The contrary had been found in a competition with an appriiser. Durie, 24th February 1636, Oliphant *contra* Oliphant.

Payment of
annualrents
makes it pu-
blich.

A WIFE's infestment for security of her jointure cannot be cled with possession during her husband's life, therefore the husband's possession is understood to be her possession, and her infestment accordingly preferable of its date. Gilmor, 15th January 1663, Campbell *contra* Lady Kilchattan. Stair, 23d November 1664, Nisbet *contra* Murray. Durie, 8th March 1622, Lady Corfinday *contra* tenants. Spotiswood (*Conjunct fee*) 15th February 1631, Lady Huttonhal *contra* Ld. of Touch. ----- This holds, tho' the husband be not in the natural possession himself, but possesses by any deriving a temporary right from him, such as tenants, wadsetters, &c. Stair, 18th, Dirleton, 17th July

Husband's
possession the
wife's posses-
sion.

July 1667, Lady Burgie *contra* Sir John Strachan. ----- The like, where the husband's mother, a liferenter, was in the natural possession. Stair, Dirleton, Gosford, 21st February 1672, Reid *contra* Countess of Dundee. ----- And the father disposing the fee to his son, reserving his own liferent, his possession was found sufficient to clothe his daughter-in-law's right with possession, tho' that seem'd to be *duplex fictio*. Fountainhall, 14th February 1696, Lady Reres *contra* Inglis and Wood. ----- In a competition betwixt an adjudger infest, and the common debtor's relict, infest base upon her contract of marriage; the adjudger was preferred, in respect the brocard, that the husband's possession is the wife's possession, will only hold while he is alive; and here the relict, after her husband's decease, neglected to insist for possession or to publish her right. Fountainhall, 11th January 1698, Stodart *contra* Oswald. ----- In a competition betwixt the donatary of a forfeiture and the rebel's relict, touching her jointure, she alledging, that her right of liferent was publick, as being reserved in the body of her husband's infestment, tho' the charter and sasine (which only makes the right publick) bore nothing of her liferent; the Lords, in respect of the favourableness of a jointure, found this general reservation equivalent to a confirmation, and so preferred her to the donatary, who in strict law (says the author) had much to say. Fountainhall, 17th March 1685, Lady Earlstoun *contra* Colonel Mayne and others. ----- A tack was preferred to a base infestment given by the setter to his wife thereafter, tho' her sasine was taken before the tacksmen obtained possession, in respect he obtained it before the setter's death, and the setter's possession was not accounted his wife's possession, so as to clothe her infestment, and make it valid from the date. Durie, 23d July 1628, Lady Ednem *contra* Ld.

Father's possession, if the son's possession.

A SON being infest, holding of his father, the father's possession, upon a reserved liferent, was not found to be the son's possession: For the Lords thought, if possession by such reservation betwixt father and son were sufficient, the creditors could hardly be secure. Durie, 17th July 1635, Lord Craighall *contra* Bothwell. Durie, 26th June 1634, Bruce *contra* Durie. Stair, 14th June 1666, Home *contra* Home. ----- The like, 18th December 1666, Ld. Newbeath *contra* Dunbar of Burgie. See also a similar case, 10th July 1669, Gardner *contra* Colvil. ----- The contrary was lately found, 16th January 1730, Barclay of Busbie *contra* Gemmil. ----- A father granted at the same time two base infestments to two of his sons, reserving in both his own liferent; in a competition betwixt the singular successors in these base rights, it was found, That the father's possession by reservation of his liferent, did sufficiently validate both infestments; for in this case there could be no ground of simulation, which is always presumed in rights granted to children, when competing with onerous creditors. Stair, Gosford, 30th June 1668, Skein *contra* Cristie.

Reverfer's possession, if the wadsetter's possession.

THE heritor's possession by a back-tack, was not found to validate a base infestment of wadset, unless payment of the back-tack-duty had been obtained. Stair, 11th January 1678, Laurie *contra* Irvine, Durie, 11th July 1628, Lady Collington *contra* Haswell.

POSSESSION of the principal lands, is possession of the warrandice Possession of the principal lands, is possession of the warrandice lands.
lands. Stair, Dirleton, Gilmor, 9th January 1666, Brown *contra* Scot.
--- The same found, tho' warrandice was granted *ex intervallo*, and not
in the same infestment with the principal lands. Stair, 20th February
1668, Forbes *contra* Innes.

A BASE infestment granted for relief of cautionry, is not valid Infestment of relief, if valid without possession.
without possession; and therefore such are not in the same case with
base infestments of warrandice, where the possession of the principal
lands is, *fictione juris*, a possession of the warrandice lands. Stair, Gos-
ford, 26th June 1677, Inglis *contra* tenants of East-barns. --- Found
that an infestment of Relief, tho' base, yet being a complete right *in*
 suo genere, was preferable without possession to a posterior publick
voluntary infestment. Home, February 1682, Bruce *contra* cre-
ditors of Clackmannan. And again, Home, March 1682, Earl
of Kincardine's creditors competing. --- Infestments of relief are not
publick from the date, nor from the time of distress, until possession
be apprehended, and any posterior infestment publick before the said
possession (tho' intervening between the date of the base *sale* and
distress) is preferable. Marcus (*Infestment*) 1st July 1691, ranking
of the creditors of Lanton.

In a competition betwixt a prior base infestment, and a posterior Possession of a part, if it validates as to the whole.
publick one, this having never attained possession, but the former
having possess'd the greater part of the lands, this was found suffi-
cient to defend against the publick infestment for the lands where-
of the defender was never in possession, as well as those he pos-
sess'd, because the infestment was indivisible. Durie, 14th Janua-
ry 1630, Hunter *contra* his tenants. --- A base infestment of an-
nualrent out of two separate tenements is validated as to both, by
uplifting mails and duties from the tenants of either. Stair, 6th No-
vember 1678, Miln *contra* Hay. --- Found, That a cautioner's pay-
ing annualrent did clothe an infestment with possession of the princi-
pal's lands, and, *e contra*, as well as if it had been gotten from both.
Fountainhall, 27th November 1678, Reid *contra* Bruce. --- A fa-
ther infesting his second son in an annualrent out of his lands, effeiring
to an accumulated principal sum, the one half whereof was borrowed
money, and the other his portion, found, That the said infestment, if
clothed with possession, as to the half (*viz.* the borrowed money)
is publick *in solidum*, tho' the son had not, nay could not attain
possession as to the other half, the annualrent being only to commence
at his father's death, which had not yet happened. Dirleton, 5th Fe-
bruary 1668, Ker *contra* Ker. --- Possession upon an infestment
of corroboration was found to validate the original infestment of an-
nualrent which was granted out of other lands. Stair, Gosford, 9th
July 1668, Alexander *contra* Ld. of Clackmannan.

COMPETITION of a base infestment with a *liferent escheat*.
See Escheat.

CONFIRMATION, in what cases it makes a base infestment
to hold of the superior confirming. *See Confirmation.*

BASTARDY.

Bastard's
children suc-
ceed to him.

FOUND that the king has no right to any of a deceased bastard's goods, if he leave a lawful child who may succeed to him as heir, altho' he leave no heritage. Balfour (*Bastards*) Sinclair, 11th and 17th December and 24th March 1546, Dundas donatar *contra* Moffat. ——— The same, Balfour (*Bastards*) 7th December 1563, Auld *contra* Miller.

Strangers
may succeed as
heirs of provi-
sion.

LANDS being disposed to a man in liferent, and his bastard in fee, and, failing of heirs male of the bastard's body, to a third party; upon the bastard's deceasing without heirs male, the Lords reduced a gift of bastardy made by the king to another, and found that the law *quod bastardus, non potest habere hæredem, nisi de corpore suo legitime procreatum*, is to be understood only of the legal heir, not of heirs of provision. Spotiswood (*Bastard*) Colvil, March 1584, Innes *contra* Hay, Lord Register and his Majesty's advocate.

Bastard's re-
lict has her le-
gal interest.

IF the bastard was married, and died without children, the gift of bastardy will only carry the one half of the goods, the other belonging to the wife. Sinclair, 3d March 1541, Earl of Errol *contra* Durie, 7th July 1629, Wallace *contra* Muir. ——— A bastard leaving a wife, but no children, the king's donatar has right to the whole heritage and heirship moveables, as also to the half of the other moveables, he finding caution to pay the bastard's debts, funeral charges, &c. Balfour, (*Bastards*) 18th February 1502, relict of William Murray *contra* king's advocate. Spotiswood (*Bastard*) Maitland, 29th July 1566.

If the ba-
stard's issue
fail.

IF the lawful issue of the bastard at any time fail, their goods become caducuary, and return to the king by the right of *ultimus hæres*, with respect to such subjects as were established in their persons; and by the right of bastardy, with respect to such subjects, wherein they died in the state of apparent heirs to the bastard. Durie, 13th July 1626, Ld. Halcro *contra* Sommervell.

Bastard has
not *testamenti*
factionem, un-
less he leave
lawful issue.

A BASTARD having no lawful issue, has no power of testing, and can neither nominate executors, nor leave legacies, unless he obtain legitimation from the king. Stair, 18th June 1678, commissioners of the shire of Berwick *contra* Craw. ——— Found that a bastard, tho' not legitimate, may leave tutors to his children who are to succeed to his means, and that he may nominate them executors; altho' it was alleged, that a bastard not legitimate, notwithstanding he had lawful children, could not have *testamenti factionem*; and that if he nominate them his executors, yet their succession would not be *ratione testamenti*, but *ratione sanguinis*, which was repelled, because if the bastard should have a plurality of children, and nominate one of them executor, that child would have right only *jure testamenti*; for if it were *jure sanguinis*, they would all succeed alike. Durie, 8th March 1628, Muir and Thomson *contra* Kincaid.

If

IF a bastard obtain from the king power of testing, his legatar will be preferable to the donatar of bastardy. Durie, 7th July 1629, Wallace *contra* Muir. Or unless he be legitimate.

LANDS or goods of a bastard, or person deceasing without an heir, pertain not to the Lord of regality, unless specially exprest in his infestment. Haddington, June 1601, Buchanan *contra* Campbell. If the bastard's effects fall to the Lord of regality.
 ----- The like, Haddington, 18th February 1612, Sibbald *contra* Grieg.

A DONATARY of bastardy found only liable *secundum vires hæreditatis*. Falconer, 24th November 1685, Galbraith *contra* Deans. Donatar of bastardy how far liable to creditors.

BATTERY.

IT was found, That invasion by any stroke, tho' without blood, fell within the act 1594, Cap. 119, *anent slaughter, and troubling of parties in pursuit and defence of their actions*. Stair, Gosford, 31st January 1673, Sleich *contra* Swinton. ----- During the dependence of a process, the pursuer, in a quarrel betwixt him and the defender upon another head than that process, having thrown a lighted candle at him, by which he received no hurt; yet the Lords considered, That if they should once find such practices not to be included in the meaning of the act of parliament, but only down-right beating, wounding, or invading, insults of this kind would be encouraged; and that it was easy to abstract from the depending plea, and forge another quarrel; and that the act was necessary to curb the *præservida Scotorum ingenia*; and also calling to mind, that in a former case, 13th November 1695, Sir Alexander Falconer of Glenfarquhar *contra* Sir David Carnegy of Pittarrow, it was found, That Pittarrow's running with his drawn sword at Glenfarquhar was an invasion in terms of the law, tho' Glenfarquhar was not touched, nor did any prejudice ensue; therefore they found, That this case, tho' but a slender attempt, fell within the meaning of the act of parliament, and so asfoilzied the defender. Fountainhall, 6th June 1699, Williamson *contra* provost Govan. ----- The like, Stair, 13th February 1679, Cruickshank *contra* Gordon. ----- In a battery, *pendente lite*, all that was proven for battery, being, that the pursuer coming to her brother's house, and desiring to stay all night, he refused it, and ordained six or seven armed men to carry her to the miln, where she was detained all night, and sentries set upon her at the door, that she might not escape, and she dismiss'd the next day, the act of parliament about battery speaking not only of beating, bleeding, wounding, but also of any manner of way whereon they might be criminally accused, and the detaining a person *in carcere privato*, without the warrant or authority of a judge, being a very high crime, the Lords therefore found, That the detaining her prisoner under sentries, fell under the meaning of the act of parliament. Fountainhall, 12th February 1712, Robertson *contra* Strowan her brother. ----- A woman pursuer of a process, What understood a battery.

A a

process, having struck the defender on the mouth with the back of her hand, but no blood following, the Lords found, That this was not such a beating and invading, as to fall under the act of parliament inferring tinsel of the cause. Fountainhall, 18th January 1709, *Fea contra Trail*.

The act to be understood of the first aggressor.

THE act to be understood of the first aggressor, and tho' the party invaded, in his defence, wound the aggressor, that does not take off the penalty of the act. Stair, Gosford, 31st January 1673, *Sleich contra Swinton*.

Premeditated design to provoke.

IN the case betwixt Sinclair of Bradsterdorn and Sinclair of Southdun, the Lords assilzied from a battery *pendente lite*, some qualifications being condescended on of a premeditated intention in the complainant, to provoke the other to make the alledged assault upon his person. 12th November 1730.

In whose favour the act directed.

THE Lords found, That the beating of a burges, during a process against the town, is not sufficient to infer the penalty of the act of parliament touching battery, during the dependence of a process. Bruce, 19th January 1715, town of Peebles *contra Murray of Cringly younger*. ——— Taking the benefit of a battery *pendente lite*, is a merely personal privilege; and therefore cannot be founded upon by the cautioner in a suspension, unless he subsume, that the principal is *lapsed*, and that he would otherwise totally lose his relief. Fountainhall, ult. February 1695, *Johnston contra Forbes of Waterton*.

Effect of a battery.

IN actions where battery has interveened, the Lords decerned the aggressor to lose the whole plea, tho' he had divers interlocutors in his favours, seeing the whole cause had not come to a period by sentence. Falconer, 20th January 1683, *Maxwell contra Stewart*. ——— Found, That when one party invades another during a dependence, decret is to be pronounced conform to the libel or summons, and not conform to the act of litiscontestation, if it be narrower than the libel. Marcus (*Summons*) January 1687, *Dr. Strachan contra Tolquhon*.

The act has place, before whatever court the process be carried on.

THIS act of parliament does equally extend to all Judicatories where processes are intended. Gosford, ult. January 1673, *Swinton contra Sleich*.

Battery how soppite.

A SISTER having obtained decret against her brother for her bond of provision, but the decret not giving her the whole claim, many years annualrents being cut off, and the brother having also appealed to the house of Lords from that sentence, and then the sister insisting upon a battery during the process, which he alledged she could not now recur to, having made her election, and prevailed in the action, the Lords nevertheless found, That she might still insist in this complaint. Fountainhall, 12th February 1712, *Robertson contra Strowan her brother*.

BENEFICIUM COMPETENTIAE.

A FATHER cannot by our law defend against his children, upon the maxim, That *tenetur tantum in quantum sacre potest.* Gosford, 24th February 1669, Dicks *contra* Dick. ---- In our law parents have not *beneficium competentiae.* Marcus (*Summons*) July 1687, Cairns *contra* Cairns of Bellamore.

BILL of EXCHANGE.

THE Lords found that salt bills, meal bills, or precepts for delivering the like fungibles, are not privileged as bills of exchange for payment of money; yet found them probative *in re mercatoria*, without writer's name and witnesses, and without the ordinary solemnities required in other writs. Forbes, MS. 16th December 1713, Lesly *contra* Robertson. ---- The contrary in terms was afterwards found, so that a bill or precept for the delivery of fungibles is not sustain'd so much as a probative writ. November 1729, Bruce of Powfoulis *contra* Wark and Maxwell.

Money the
only subject of
Bills.

AN obligation to pay 10 shillings Sterl. *per diem*, until the person should be provided with a company in the army, conceived in the form of a bill, found null. Home; February 1721, Viscount of Garnock *contra* Duke of Queensberry. ---- Sir, Against the first of January, pay to me or order, at the clerk's chamber in Musleburgh, the sum of L. 100, and that as the price of my growing croft of corn and grass in the town of Musleburgh, which are instantly sold you at the foresaid Price, by your humble servant, &c. The Lords found this an effectual bill, notwithstanding it was pled, That it could not be considered as a proper bill, not being a simple acceptance of a draught for a sum of money, but really and truly a contract of sale. 6th December 1722, Wilson *contra* Smith. ---- A bill sustain'd in the following terms, "Pay to me or order the sum of ; and this, with my receipt, shall be a sufficient discharge of all I can ask or claim of you preceeding this date;" tho' it was pled, That the bill was null, as containing a general discharge, incongruous to the nature and form of a bill; in respect it was answered, that if the bill was the result of a compt and reckoning, there could be no harm in expressing the cause of granting; and once fixing this point, the very retiring of the bill is a general discharge of course: The rule is, that it cannot vitiate a bill to stipulate what would equally follow, tho' it were not exprest. 21st February 1738, Trotter *contra* Shiel.

Nature of a
bill.

THE Lords found that a bill granted on death-bed, was not a legal method of constituting a debt or legacy, even so far as to affect moveables, in so far as the bill was gratuitous. 13th February 1724, Huttons *contra* Hutton. ---- The same, Home, 9th November 1722, Full-

Gratuitous
bill, null.

ton and Clark *contra* Blair. ----- Found in general, that a donation cannot be constituted by a writing in form of a bill. 3d December 1736, Weir *contra* Parkhill.

Bearing annualrent or penalty.

BILLS are sustain'd, tho' bearing annualrent from the date and before the term of payment. Home, December 1727, Henderson *contra* Sinclair. 28th June 1737, Dinwoodie *contra* Johnston. 13th December 1738, Gilhagie *contra* Orr. ----- But bills bearing annualrent and penalty are null, because such stipulations belong not to the nature of a bill, *Ibidem*. In an action of recourse at the indorsee's instance, against the indorser of a bill of exchange, null, as bearing annualrent and penalty; the Lords found, that the indorstation being but a relative writ, must stand and fall with the bill, and therefore that the indorstation as well as the bill was null and void, and incapable of sustaining action of recourse. It was argued here, That indorstation is a new bill, upon which footing an indorstation of a bond has been sustain'd; and therefore if the indorstation be regular, action ought to be sustain'd upon it, tho' the bond or bill to which it refers be null, and that equally whether the debtor be insolvent and cannot pay, or have a legal objection and will not pay. 3d December 1730, Thoirs *contra* Frazer.

Subscription of the drawer an essential requisite.

A BILL was found null, being neither sign'd by the alledged drawer, nor of his hand-writing, which was not upon the act of parliament anent blank writs, because the alledged drawer's name was in the body of the bill; but upon this footing, That a bill is a mutual contract, an order or mandate by the one party, and an acceptance of the order or mandate by the other, which binds the parties mutually, according to the nature of the mandate: And upon the common principle of contracts, both parties must be bound, or neither, and so there can be no obligation, unless the consent of the drawer be interposed as well as of the acceptor. 6th December 1738, M'Raith *contra* Murdoch. ----- In the like case, where the drawer's name was in the body of the bill, but write with another hand, arrestment laid on in the acceptor's hands before the drawer adhibite his subscription, was found good against an onerous indorsee. For here the acceptor of the bill was *ab ante* debtor, and after the debt was fairly attached by the arrestment, it could not be transformed into a bill, to disappoint the effect of the diligence. 14th February 1734, Neilson *contra* Ruffel.

Good, tho' wanting an address.

IT is sufficient if a bill is accepted, tho' not addressed to any person. Home, 28th June 1727, Grierfon *contra* Earl of Sutherland.

Wanting, to order.

A BILL is indorfable, tho' not bearing *to order*. Home, January 1726, Crichton *contra* Gibson.

If intimation is requisite.

IN a competition betwixt an indorsee and an arrester, the prior indorstation was preferred, because bills require no intimation. Fountainhall, 13th July 1698, Ewing *contra* Geills and Johnston. ----- Arbuthnot draws a precept on Heriot in favours of Anderson, to account with him for 190 Bolls meal, and 51 stone of iron, and to take his receipt for what he should pay, which Arbuthnot obliges himself to allow to Heriot; the Lords found a precept of this nature required intimation; and

and so preferred a creditor of Arbuthnot's, arresting the subject in Herriot's hand after the date of the precept, but before intimation thereof. Fountainhall, 19th July 1706, *Anderson contra Turnbull*.---- In a competition betwixt a donatar of single escheat and the porteur of a bill, drawn by the rebel upon his factor in Holland, and protested against him for not-acceptance, which of them had best right to the rebel's effects in the factor's hands; the Lords found, That the creditor in the bill upon the factor, protested for not acceptance, is preferable to the donatar of escheat, seeing the drawer of the bill was, by the draught, denuded of the subject for which the bill was drawn, and that the said bill was drawn before denunciation, and protested before the gift of escheat was seal'd or declar'd.

February 1724, competition betwixt Stewart and Elliot----- A man having drawn a bill upon his debtor, payable to Ker, and thereafter another bill payable to Parkhill, which was first protested for not acceptance; in a competition betwixt the two bills, with respect to the subject in the debtor's hands; the Lords preferred Parkhill, as having the first protest for not acceptance: For tho' a simple indorsation upon the back of a bill makes a full conveyance, without necessity of intimation, a bill drawn upon a debtor must be intimated.

February 1737, *Ker contra Chalmers*.----- A bill drawn upon a debtor, payable to a third party, and protested for not-acceptance, is equivalent to an intimate assignation, and preferable to an arrestment laid on thereafter by another creditor. 27th November 1734, *Mitchel contra Mitchel*.

A BILL drawn, payable to a third party, bore this clause, *This with the porteur's receipt shall oblige me to repay the like sum to you or your order*. The acceptor having paid the bill, indorsed the obligation for repayment; and in a process at the indorsee's instance against the drawer, it was pled, That the indorsation was a valid transmission, not only because the obligation was contained in a bill, but that all obligations whatever, are transmissible by indorsation; an indorsation being truly a bill. The Lords sustained the pursuer's title, in respect the obligation to repay was ingross'd in the Bill, and that the indorsation implied an assignation. Home, 28th June 1727, *Grieron contra Earl of Sutherland*.

In a reduction, upon the act 1696, of a disposition granted to a creditor, as in prejudice of the pursuer, a prior lawful creditor, it was objected, That the pursuer was not a prior lawful creditor, being creditor by bill drawn the same day the disposition was granted, and accepted without a date. Answered, The acceptance must be presum'd of the same date with the bill, being amongst parties living in the same town. The Lords refused to sustain this presumption. Dalrymple, 24th, Fountainhall 25th July 1702, *Man contra Walls and others*.

The porteur's action against the person upon whom the bill is drawn.

The person upon whom the bill is drawn, is bound to accept, if he is possess'd of the drawer's effects, or has given orders to draw upon him.

THE Lords found a person, who suffered a bill drawn upon him to be protested for non-acceptance, liable to the possessor in *quantum* he had of the drawer's effects at protesting the bill, which was found to put him

him *in mala fide* to pay thereafter to the drawer. Forbes, 9th December 1712, Gordon *contra* Anderson.---- Two in copartnery having commissioned a factor abroad to send them goods in company, and advised him by their letters, that they would honour his bills for the price; and one of the copartners having, in the ordinary manner, accepted the factor's bills drawn as *per* advice; and the other having accepted them for his own part; the Lords found, That the latter ought to have simply accepted the bill, and therefore was liable to the possessor for payment of the whole sum. Dalrymple, Forbes, 10th December 1712, Naughton *contra* Richie.

Extraordi-
nary privile-
ges of bills.

SEPARATE receipts of partial payments of bills of exchange, do not militate against possessors to whom these bills are afterwards indorsed. Forbes, 12th December 1711, Erskine *contra* Thomson. Dalrymple, 24th June 1714, Fairholm, *contra* Cockburn.---- Compensation upon the indorser's debt not receivable against the onerous purchaser, which holds in inland bills as well as foreign. Fountainhall, Dalrymple, *ult.* January 1699, Stewart and Gordon *contra* Campbell.---- The possessor of a bill to whom it was indorsed for value, was preferred to the indorser's creditor, who had arrested the money in the acceptor's hands before indorsation. Dalrymple, Forbes, 5th December 1712, Home *contra* Smith.---- A debtor having drawn a bill upon his chamberlain, payable to his creditor, and thereafter an arrestment being laid in his hands for a debt due by the creditor; in a competition betwixt the arrester and an onerous indorsee to the bill, the indorsation being blank, was presum'd of the same date with the bill, in order to prefer the indorsee. Forbes, 15th July 1709, Colvil *contra* Ogilvie. See Dalrymple, 9th July 1714, Mitchel *contra* Brown.---- A defence laid against a bill, that it was elicited by the drawer, after having intoxicated the acceptor with liquor, when he was insensible, and incapable of knowing what he was doing, and without any onerous cause, was not found good against an onerous indorsee, tho' it was pled, That force and fear, and such like real exceptions are sustained against onerous indorsees; it being answered, That drunkenness is but a temporary incapacity, which ought not to be regarded, especially seeing it was the acceptor's own fault. 24th February 1736, Wilson and Fraser *contra* Nisbet of Craigintinny.---- A charge upon a bill for L. 40 Sterl. at the instance of an onerous indorsee being suspended, upon this ground, That it was granted for money won at play; the Lords repelled the reason of suspension founded upon the game act, in respect the bill was purchased by the charger for onerous causes, and that no evidence was offered of his being in the knowledge that the bill was granted for a game debt. 26th January 1740, Neilson *contra* Bruce of Newgrange.---- But betwixt the drawer and acceptor themselves, where onerous purchasers are not concerned, all objections and alledgances are relevant, *hinc inde*, as in other contracts. Fountainhall, 13th February 1706, Plumer *contra* Houstoun. Forbes, 5th June 1707, Boyes *contra* Schaw. Dalrymple, 17th June 1714, Arbuthnot *contra* Pyper of Newgrange.

Bills hav-
ing no extra-
ordinary pri-
vileges.

A BILL being indorsed, not for value given at the time, but in security of debt, was found excluded by an anterior discharge, granted by the drawer to the acceptor. Forbes, Fountainhall, 15th January 1708,

1708, Crawford *contra* Pyper. — A bill drawn, payable to a third party, bore this clause, *This, with the porteur's receipt, shall oblige me to pay the like sum to you or your order*; the acceptor having paid the bill, indorsed the obligation for repayment; and in a process at the indorsee's instance against the drawer, this defence was proposed, That the obligation to repay was of the nature of an ordinary obligation, no bill of exchange, and tho' indorsible, a privilege competent to any simple obligation, it was liable to compensation upon the debt of the cedent. The Lords repelled the defence. February 1728, Grierfon *contra* Earl of Sutherland.

THE acceptor of a bill of exchange dying soon after acceptance, before any *mora* was incurred; in such a case exchange or re-exchange cannot be due, there being no voluntary failzie or fault. Stair, 8th July 1664, Kennedy *contra* Hutchison.

Acceptor how liable, if in *mora* of making payment.

Acceptor's recourse against the drawer.

AN acceptor having paid a bill drawn upon him, payable to a third party, without bearing *value in his own hands*; the Lords allowed his heir action of recourse for reimbursement. Forbes, 4th July 1711, Cunningham *contra* Agnew. — The like, Forbes, 10th July 1712, Wilson *contra* M'Kenzie.

Value not presumed to be in the acceptor's hands, unless express.

THE porteur of a bill of exchange having indorsed the same before acceptance, and the indorsee having protested for not-acceptance, it was accepted by a third party, upon advice from the drawer, but the acceptance was in these terms, *Accepts for the honour of the drawer and indorser*. In a process of recourse against the indorser, the drawer being bankrupt, it was objected, That for ought appears, the quality might have been added to the protest after the drawer was broke; and that there is no means to prevent such fraud, otherwise than by taking a document at the time of acceptance, and likewise at the time of payment, that the acceptance is in these terms. The Lords found, That a protestation was necessary at the acceptance and payment of a bill accepted and paid by a third party for the honour of the drawer and indorser, expressing the quality of the acceptance; and therefore sustain'd the defence and assilzied. Dalrymple, Fountainhall, 15th December 1703, Carstairs *contra* Paton.

Acceptance by a third party upon whom the bill was not drawn.

Possessor's recourse against the drawer.

VALUE presum'd to have been given to the drawer by the party in whose favours it is drawn, tho' it bear not value received. Forbes, 19th March 1707, Scot *contra* Laing. Bruce, 22d July 1715, Ker *contra* Brown. — The same holds with regard to an indorsee, who, upon getting the bill indorsed to him, is presumed to have given value for the same. Bruce, 11th February 1715, Auchinleck *contra* Millar. — The like with regard to the possessor of an order, bearing, "To deliver to him a certain sum, and take his receipt." Forbes, 26th January 1709, Swinton *contra* representatives of Tom. — The Earl of Forfar, July 1715, drew a precept upon the agent of his regiment

Value presum'd given to the drawer, by the person in whose favours the bill is drawn.

ment, of this tenor, *Pay to Agnew, or order, the sum of L. 111 Ster. out of the first subsistence you receive for me, which shall become due eight months after date.* In a process of recourse, found, That this precept, tho it did not bear, yet presumed value. June 1731, M'Dowal *contra* Duke of Douglass.

Unless drawn payable to a creditor.

A BILL drawn payable to a creditor, not bearing value received of him, understood to be in satisfaction *pro tanto* of the debt, and not presumed that the creditor gave present value therefore. Forbes, 18th July 1712, Cheap *contra* Arnot.

The presumption has not place in precepts for victual, &c.

A PRECEPT for victual upon tenants, with a receipt conform, found obligatory against the person in whose favours it was drawn, for payment of the price, tho' not demanded for sixteen years thereafter; and it was not presumed, that value was given when the precept was granted, it bearing no such thing. Gosford, 9th February 1672, Merchiston *contra* Robertson.

Bills must be negotiated.

THE possessor of a bill protested for not-acceptance was denied recourse, not having timously acquainted the drawer of the same, and the designed acceptor broke in the *interim* with the drawer's effects. Forbes, 10th, 21st, and 28th February 1710, Miln *contra* Erskine.—*A fortiori* was he denied recourse, who had not so much as protested for not-payment, nor done any diligence against the person drawn upon till he became insolvent. Forbes, 10th July 1706, Brand *contra* Yorkston.—In an action of recourse against the drawer of an inland bill, recourse was denied to the creditor, through his want of duly negotiating his bill, it being found, that porteurs of inland bills are subjected to the same necessity of rigorous negotiation that porteurs of foreign bills are. 9th January 1731, M'Kenzie *contra* Urquhart.—Recourse is still competent upon a bill, tho' not duly negotiated, if the drawer cannot show, that he had effects in the acceptor's hands; for, in that case, *nihil illi deest*. February 1731, M'Kenzie of Inchcoulter *contra* Urquhart.—Or, if the person upon whom the bill is drawn continue responsal. Forbes, 28th June 1706, Sir John Swinton *contra* Lady Craigmillar.

If the same hold in precepts granted to creditors.

PRECEPTS upon chamberlains or others, granted to creditors, bind them not to the formalities of presenting, protesting and intimating, necessary in formal bills, and in the matter of exchange and trade betwixt merchant and merchant. Dirleton, 27th July 1666, Earl of Newburgh *contra* Stewart.—The contrary afterwards found. Forbes, 20th December 1711, Earl of Leven *contra* Earl of Glaincairn.

What understood sufficient negotiation.

A BILL was regularly protested for not-acceptance at the term of payment, and the same intimated to the drawer. The day after, the person upon whom drawn, accepted the bill *qualificate*, payable at the distance of fourteen days; and, after elapsing of that time, a second protest was taken for not payment. In an action of recourse, pled, That this indulgence of fourteen days to the debtor must turn the risque upon the pursuer, and bar recourse; because, by that delay, the drawer's hands were tied up from using measures to recover his debt: The drawer, notwithstanding, was found liable. Forbes,

14th November 1705, Brown *contra* Home. But this case was with relation to an inland bill, the rules of negotiating which were not then well ascertained, and the bill was for a small sum.—Found relevant to infer recourse against the drawer, that the bill was timeously protested for not-payment against the acceptor, and the protesting intimated to the drawer, tho' thereafter the porteur took assignation to an infestment of annualrent in security of the debt contained in the bill, which was a transaction for the common benefit of both drawer and porteur, and could not therefore bar the action of recourse once established by the due negotiation of the Bill. Forbes, 7th, Fountainhall, 8th February 1711, Lady Nicolson *contra* Morison of Prestongrange.—In a process of recourse, it was objected, That the pursuer had failed in the negotiation, having neglected to present the bill for acceptance, a long while after it was delivered to him. Answered, The bill being drawn payable upon a day certain, was regularly presented for acceptance upon its falling due, and a protest taken for not-payment. The defence was repelled, and no necessity found to present the bill before the day of payment. Home, 16th February 1727, Ferguson of Auchinblain *contra* Malcolm.—A bill payable at sight, or days after sight, requires not the same rigorous negotiation with bills payable at a day certain; such a bill is designed for the benefit of the holder, that he may call for the money as his exigencies require, and so a discretionary power is understood given him to present the bill, sooner or later. Upon which footing, recourse was sustained upon a bill payable fourteen days after sight, tho' had it been presented for acceptance by the course of the post, it might have been exigible four days before the acceptor broke and went off, whereas, by the holder's delay, it became not due till after the bankruptcy. 7th February 1735, Gordon *contra* Innes.—But, upon a reclaiming petition, the matter was transacted.

ONE at Edinburgh having bought a bill upon London, payable to his correspondent at Bristol, who accidentally happened, at that time, to be abroad upon a voyage, and, before his return, the London merchant broke, and so it happened, that the bill was not negotiated, yet recourse was sustained against the drawer, seeing here the porteur was guilty of no fault or negligence. Stair, 1st July, Dirleton, June 1676, Wallace *contra* Simpson.—'Tis sufficient to bar recourse upon a bill, that the not-payment or not-acceptance was not duly notified to the drawer; and the alledgance was not found relevant, that he heard of the same from third parties, seeing he was to rely upon a notification from the porteur himself, or by his order. February 1731, M'Kenzie of Inchcoulter *contra* Urquhart.

IN a process of recourse, it being objected, That the pursuer had failed in diligence, in so far as he had given the debtor a long day to make payment; Answered, *Non relevat*, unless it be instructed, that in the *interim* the acceptor broke with the drawer's effects in his hands. Replied, Porteurs are bound to strict diligence, and the least failure turns the hazard entirely upon them: It is sufficient therefore to say, That if the acceptor had not got a delay, the drawer might possibly have recovered his money. The proof, in such a case, would be difficult, if not inextricable; and it would be unreasonable to lay him under

Excuses for failure of negotiation; how

Effect of neglecting to negotiate.

der this burden, where the fault was the porteur's. The Lords affoiled from recourse. 18th December 1729, Flower *contra* Pringle. ——— The like, where the porteur had failed to intimate to the drawer the dishonour of the bill. *Ibid.* 12th July 1729, Ferguson *contra* Malcolm.

Bills by the lapse of time lose their privilege.

Bills by the lapse of time lose their extraordinary privileges, and come to be of the nature of any common obligation.

A BILL being suffered to ly over without any diligence thereon for payment during five years, the Lords found, That the indorsee was only to be considered as a common assigney, liable to the exceptions competent against his cedent. Dalrymple, Bruce, 18th February 1715, Murray *contra* Grierfon. ——— The like, Dalrymple, Bruce, 19th February 1715, Douglass *contra* Erskine. ——— An inland bill having lien over three years, without protest or other diligence upon it, compensation upon the debt of the indorser was found competent against the indorsee for an onerous cause, in respect it was not judged for the benefit of commerce, that bills not protested in three years should be better than bonds; or that bills which can easily be forged should stand out as lasting securities. 6th February 1719, Farquharson *contra* Brown. ——— But, in a parallel case, compensation was not sustained where the bill had lien over but two years and eleven months. February 1728, Grierfon *contra* Earl of Sutherland and Lord Strathnaver. ——— A bill having lien over betwixt five and six years from the term of payment without diligence, and thereafter indorsed, it was found to have lost the privileges of a bill of exchange, and that the indorsation imported only the warrandice of an assignation; and therefore, that recourse was not competent thereupon. January 1729, Hodge *contra* Spiers.

If they lose their ordinary privileges, and cease to be probative by a longer lapse of time.

THE Lords sustained action upon a bill of exchange, tho' it had lien over near twenty years; but here the pursuit was against the acceptor himself, acknowledging his subscription, and offering no objection against the bill, save the length of time it had lien over. June 1728, Hedderwick *contra* Strachan. ——— In a process of recourse at the instance of an executor, who, after the bill had lien over twenty three years in the defunct's custody, protested the same for non-acceptance, the drawer had nothing to say for want of due negotiation, because the designed acceptor was solvent; but he pled, That the bill was null upon the act 1681, as wanting writer's name and witnesses. He allowed, that bills are excepted out of this act by custom, for the benefit of commerce, and by analogy to the laws of trading nations; but then the exception ought not to be absolute; it ought to be no broader than the practice of other nations will support it, from whence the exception it copied; and there is no trading nation in Europe where there is not a limitation upon the currency of bills; in some, five years, in some, six, in others seven; but not one goes the length of twenty. The defence was repelled. 5th July 1734; relict of George Swan *contra* provost John Campbell.

BILLS bear annualrent. See Annualrent.

BILLS fall under the act of Bankruptcy. See Bankrupt.

BLANK

BLANK bill. See Blank writ.

AS to co-accepters and co-creditors. See Solidum & pro rata.

BILL probative of its date. See Proof.

BILL granted on death-bed proves not its onerous cause. See Proof.

INDORSEE's private knowledge of exceptions. See Bona & mala fides.

BLANK WRIT.

GRANTING a blank bond implies a renunciation of all exceptions competent at the time; and therefore found, That compensation could not be objected against a possessor of a blank bond, upon the debt of the original creditor. Stair, 27th February 1668, Henderson *contra* Birnie. — In like manner, a bond granted for the price of land, blank in the creditor's name, out of the hand of the original creditor, was found effectual; and that the granter could not stop payment, upon an alledgance, that incumberances were not purged. Stair, Gosford, 19th December 1676, Grant *contra* Lord Bamiff.

Granting a blank bond implies a renunciation of all exceptions competent at the time,

THE granting of a blank bond found to be a passing from all grounds of compensation competent to the debtor before the granting of the bond; but not for those emerging thereafter. Marcus (*Compensation*) January 1687, Grant *contra* M' Intosh.

But not of exceptions afterwards emerging.

BLANK bond requires intimation, and all exceptions emerging betwixt the date of the bond and intimation good against the cedent, will be sustained against the assignee: Thus compensation was sustained. Marcus (*Compensation*) March 1684, Sir Godfrey M' Culloch *contra* Cleland. — The like, June 1733, Baillie *contra* Dawson. — An arrester was preferred to a party whose name was filled up in a blank bond; seeing the filling up was not intimated to the debtor before the arrestment. Newbyth, Stair, Gilmour, 11th November 1665, Telfer *contra* Geddes. — Again, Stair, 1st December 1665, *inter eosdem*. — The like, Stair, 18th January 1668, Brown *contra* Henderson. Fountainhall, 11th February 1697, Campbell of Cefnock *contra* Blackbarony. — See also, Durie, 9th February 1627, Crawford *contra* Crawford.

Blank bond requires intimation, and all exceptions emerging, betwixt the date of the bond and intimation, will operate against the assignee.

A BLANK bond lying by the creditor at his death, no person has a right to fill up his name therein; but it must be confirmed as *in bonis defuncti*. Stair, 3d June 1680, Buchanan *contra* Nairne. Gosford, 3d February 1670, Earl of Kinghorn *contra* Ld. of Pittarrow. — In a reduction at the instance of the nearest of kin, of a disposition *omnium bonorum*, in favours of a stranger, the reason insisted on, was, That

Blank writ lying by creditor at his death.

the disposition has been signed blank, and probably taken out of the defunct's pocket after his decease, by the Lady in whose house he died, and the blank filled up with the name of one of her sons. The Lords, before answer, having allowed a conjunct probation, it came out, That the disposition was not filled up till after the granter's death, and therefore they reduced the same; and tho' the Lady deponed she had his order for doing it, yet that being a mandate, *perit morte mandatoris*; yea, tho' he had filled it up after his sickness, it was still reducible *ex capite lecti*. Fountainhall, 29th December 1697, M'Kenzie contra Sutherland.

Decisions upon the act 25th, Parl. 1695.

THE Lords sustained a blank bond, tho' it was not delivered till after the 25th act, parl. 1696; because it was subscribed before the said statute. Forbes, 15th March 1707, Earl of Leven contra Scot.

THIS act extended to a disposition of Tailzie, blank only in the substitution, so as to annul that substitution, tho' afterwards filled up according to the direction of the Tailzier. Home, 13th July 1722, Competition Kennedy of Culzean with Arbuthnot.

A BILL being drawn blank in the creditor's name, the Lords found, That such bills fall within the compass of the said act; and that the bill was null, the exception in the act being only concerning indorsations. Fountainhall, 13th, Forbes, 9th February 1711, Brand contra Anderson. — A bill taken payable to the bearer, found null upon this act. 8th January 1730, executors of Major Robert Walkingham contra Campbell.

IN a reduction of a bill upon the act 1696, as being blank in the drawer's name when accepted; and the same being referred to the creditor's oath, he deponed, "That the bill was left blank in his hands, as a fund of credit, for procuring the loan of the sum therein mentioned; that within two days he himself made up the sum, delivered it to the acceptor, and thereupon subscribed his own name as drawer." The act statutes, That the creditor's name be insert before delivery; and some of the Lords were of opinion, That by this was meant the delivery of the deed itself, which would make the bill in this case null; but it carried to sustain the bill, because, in the eye of law, it was not considered as a delivered evident, until the money was advanced, at which time, and no sooner, did it commence to be a *jus crediti*. 27th July 1738, Henderson contra Davidson.

BONA & MALA FIDES.

*Bona fides
non prodest ad-
quirere volenti-
bus.*

THE cautioner for one Suttie, a factor in Flanders, being pursued for goods sent him from Eymouth, seven days after he was depos'd by the convention of burrows at Glasgow; Alledged for the defender, That he was free from the very day the factor was discharged from his office. Answered, The lieges were in *bona fide* to correspond with the factor till his discharge was intimate, and the goods pursued

sued for were shipp'd before the commissioners return from the convention. Replied, That as he was named a factor without publick intimation, there was no necessity to intimate his deposition, at least the cautioner is not to be burdened with the intimation. The Lords assilzied the cautioner. *Harcus (Cautioners)* March 1682, *Trotter contra Alexander Young*.

PRIVATE knowledge of a prior assignation was so far found sufficient certiation, as to put another in *mala fide* who obtained a second. *Colvill*, June 1582, *Stirling contra White and Drummond*.----- A publick infeftment being given to a man and his wife in conjunct fee, and a *medium impedimentum* interveening before confirmation, *viz.* a base infeftment to a third party, yet the Lords drew back the confirmation to the date of the infeftment confirmed, in respect the base infester had acknowledged the conjunct fiar's right, in taking the disponent obliged to procure her consent to his right. *Spotiswood (Conjunct fee)* 13th. February, *Durie*, 4th February 1629, *Home of Ayton contra Home*.----- The like, *Durie*, 15th February 1637, *Lauder contra Goodwife of Whitekirk*.----- A wadsetter having disposed the subject to his daughter and the heirs of her body, which failing, to certain substitutes named, with a prohibitory clause, That the daughter should do nothing to prejudice the heirs of tailzie, and the daughter making up her titles to the subject as heir of line, neglecting the entail, and disposing the same to her husband in her contract of marriage; the husband uplifting the wadset sum, was found liable to refund the same to the substitutes, there being no heirs of the marriage: For, tho' an onerous purchaser of the wadset, not knowing of the disposition of tailzie before his purchase, would have been secure, yet the husband having, beside the wadset, got a plentiful tocher, and having known of the disposition of tailzie, which he had in his keeping before uplifting the wadset sum, this was found to put him in *mala fide*. *Stair*, 25th July 1661, *Weemys contra Lord Torphichen*.

Private knowledge of a prior right.

THE possessor of a bill having raised a process for recourse against the drawer, and thereafter indorsed the bill, in a new process for recourse at the indorsee's instance, his knowledge of the former process, which rendered the bill litigious, found relevant to subject him to the oath of the indorser. *Forbes*, 29th January 1708, *Fulton contra Johnston*.----- In a competition betwixt an arrester of a bill of exchange and an onerous indorsee, who, at the time the indorsation was taken, knew the arrestment was laid on, and saw that the bill was not signed by the drawer, tho' he was named in the body of the bill, but got him then to add his subscription, the Lords found it relevant to prefer the arrester, that it consisted with the indorsee's knowledge, that the arrestment was laid on before signing the bill by the drawer. June 1728, Competition betwixt Logan and M'Coull.

Indorsee's private knowledge of exceptions competent against the indorser of a bill.

THE managers of the manufactures in Edinburgh having required a Baillie's concurrence at nine o'Clock at night in winter, for searching for prohibited goods, hid in two houses that were private ones, and, upon his delay, taking instruments, and giving in a complaint to the

Ignorantia juris.

Lords, founded upon the 8th and 12th acts of parliament 1700; the Lords found, That in this circumstance the baillie had not obeyed the act of parliament; for they thought that magistrates might be required to give their concurrence at any time, whether by day or by night, except from ten at night to five in the morning; and found, that the informers were not bound to describe the houses, inhabitants, or masters where they craved the search to be made; but the baillie was nevertheless assilzied from the fine, because of his *probabilis ignorantia juris*. Fountainhall, 30th November 1703, Fairholm *contra* Warrender. The Lords found it unwarrantable in a messenger to commit one to prison by virtue of a caption for debt, after intimation of a sist, upon a bill of suspension, obtain'd by the prisoner, altho' he was in the messenger's hands before the sist was intimated or procured; but the messenger, in respect of his *probabilis ignorantia juris*, was not found liable to pay any expences to the prisoner, upon account of his incarceration. Forbes, 27th July 1710, Lamb *contra* Cleland and Gibson. — Magistrates were found liable in a subsidiary action for the debt, having refused to receive the debtor into their prison, tho' required by a messenger in virtue of a caption: And it was found no sufficient excuse, that an attested double of an expedite suspension was intimated to them in behalf of the debtor, for they ought to have regarded nothing but the suspension itself. Forbes, 3d December 1709, Sir John M'Kenzie of Coul *contra* magistrates of Inverness. — It does not save from recognition, that the vassal dispon'd through ignorance of the law, and not by contempt or ingratitude. Stair, 5th February 1663, Lady Carnegie *contra* Lord Cranburn. — A relict having confirmed a bond bearing annualrent, and uplifted her third of it, which she had no right to do, the heir's tutors were found liable for the same, *ob negligentiam*, in not pursuing for repetition, and *ignorantia juris* was not sustained as a defence for them. Gosford, 19th January 1670, Balfour *contra* Wood.

Command
of a superior,
how far it in-
fers bona fides.

In a subsidiary action against a Goaler's relict (as representing him) for his suffering a prisoner to escape, the Lords assilzied the relict, because it behoved her husband to obey the magistrates. Fountainhall, 15th November 1679, Williamson *contra* Sir Patrick Threapland. — Found, That tho' a wife was accessary to a spuilzie committed by her husband, yet after his decease she cannot be pursued for the same. Balfour (*Husband*) 9th November 1565, Crichton *contra* Crichton. Maitland, 27th November 1565, Bryson *contra* Somervell. — As also found, That altho' a decret of spuilzie and ejection was obtained against a husband and his wife as joint actors, yet it could receive no execution against the wife or her executors. Balfour (*Husband*) 29th March 1561, Wardlaw *contra* Ld. of Torrey's heirs.

BONA fides & probabilis ignorantia pled as an exception to a spuilzie. See Spuilzie.

PRIVATE knowledge of an assignation, bars not the debtor from making payment. See Assignation.

Bona

Bona Fide Consumption.

HE who has a decret in a double poinding for a principal sum and byruns against a principal party not compearing, he will bruik the duties received so long as the decret stands unreduced, because the decret and act of parliament make these duties *fructus bona fide perceptos*; but he may be decerned to pay back the principal sum, if the party who was absent, now pursuing, show manifestly that his was a preferable right. Haddington, 18th July 1610, Johnston *contra* Ireland. --- A party receiving an ox by mistake, which was sent in complement to another, and the receiver supposing it sent by some friend in the country who had forgot to write with it, and consuming it in his family, the Lords, in a pursuit for the price, repelled the defence of *bona fide receptum & consumptum*, and found him liable, as having the ox, *sine causa*. Fountainhall, 29th November 1698, Finlay *contra* Monro.

Saves from repetition of the fruits, not of the value or price of the subject itself.

AN adjudication, long after the expiry of the legal, being restricted to a security, because more was adjudged for than was due, the Lords found the rents intromitted with after expiry of the legal, while the adjudger *bona fide* considered himself as proprietor unaccountable, did yet impute to extinguish the adjudication. Home, January 1720, Walker *contra* M'Pherson and Forrester. --- The like, 20th June 1722, betwixt Rutherford and Crombie. February 1732, Balfour *contra* Wilkieson. --- See Bruce, 21st January 1715 Erskine *contra* Hamilton. --- A Lady being provided in her contract of marriage to the house and parks indefinitely, and the Lords having found the provision was to be understood of such parks only as the husband kept for the use of his family, not of such as were set out for rent; they now found, That she could not retain the rent of these, as *fructus bona fide percepti*, even before interlocutor, in respect she had a jointure out of the estate by way of annuity, in payment whereof the rent of these parks ought to be imputed *pro tanto*. Marcus, (*Escheat*) March 1683, donatar to Buchanan's escheat *contra* his relict. --- Tho' an apprising was declared extinguished within the legal, yet a part of the comprised lands coming in the person of a singular successor to the appriser, was found *titulus bonæ fidei* against repetition of the fruits intromitted with by the singular successor; but found, That if there was another debt due to him the time of his intromission, by the party whose lands were apprised, it ought to be applied towards the satisfaction of that debt. Marcus, (*Comprisings*) January 1683, Lady Hilleside *contra* Baillie of Littlegill.

Saves from repetition of the fruits, but not from extinction of any extinguishable right in the possessor's person.

IN a special declarator of a rebel's liferent escheat against an intromitter with his rents, the Lords found his preceeding intromissions to have been *bona fide*, the fruits being *percepti & consumpti* by the defender, who was never interrupted in his possession by the superior's donatar; and this, altho' the defender's right was granted after the rebellion, which was found sufficient for bygones, but not to defend him for time coming since the citation in the special declarator. Durie, 19th February 1635, Cunningham *contra* Stewart. --- A creditor to

Possession upon a right good *ex facie*, tho' liable to objections.

a father, being by him put in possession of some of his son's lands for security of the debt; the defence, That the son's right (whose administrator the father was) had never been intimated, was found sufficient to liberate that creditor, when pursued by the son for bygones. Durie, 2d December 1635, Home *contra* Lady Haddington. --- A lady being provided in her contract of marriage to a liferent of some tiends in her husband's person for many years to run, pursuing a party who had comprised these tiends, and intromitted after dissolution of the marriage by divorce; the Lords found him not liable for bygones, notwithstanding her preceeding right, because he was *bona fide possessor*. Durie, 21st March 1637, Lady Manderston *contra* Ld. Renton. --- Found that the courtesy being a benefit competent to the husband, who did not seek the same conform to the custom of the kingdom, therefore his executors could not pursue for it, especially after a tract of several years, where the rents of the lands were *bona fide* uplifted by virtue of an heritable title, competent to one who had bought the lands from the heiress's heir. Durie, Spotiswood, (*Curialitas*) 19th January 1636, M'Aulay *contra* Watson. --- Found that an heir, pursuing a process of aliment against his mother liferentrix, will get nothing modified for the years preceeding the summons, the defender having *bona fide* consumed her whole annuities these years; and the liferented lands not being ward lands, which, by act of parliament, are burdened with the heir's aliment, but lands feu or blench, to which the act is extended by practick only. Marcus, (*Aliment*) Falconer, 27th November 1685, the heir of Kirklands *contra* his mother. --- A bishop having granted a liferent commission of the office of procurator-fiscal of his commissary court, and a succeeding bishop having turned him out, and given a commission to another, who continued in possession some years; but the liferent commission being thereafter found effectual, and the party reponed to his office by sentence, he insisted against the other for the *interim* profits, as to which the exception was sustained of *bona fide* consumption. Durie, 17th February 1624, Thomson *contra* Law.

Possession upon a right null *ex facie*.

A TENANT's tack having been reduced, because it bore to be set by a minor with consent of his curators, and yet none of them were subscribing, and now the tenant craving allowance for expences of the meliorations and improvements he had made of the subject during the first six years of the tack, he having possessed in all about twenty years; the Lords found him *mala fide possessor*, because of his null tack, and therefore that he could have no allowance for his improvements; and that if any were due, they were more than compensated and reimbursed by his long lucrative possession posterior thereto, tho' this *lucrum* was the effect of these improvements. Fountainhall, 2d January 1711, Lady Cardross *contra* Hamilton. --- In a process at the instance of the king's advocate against persons excommunicated, for the value of the corns growing upon the lands possessed by themselves, divers years after the excommunication; the Lords allowed them defalcation of the seed, tiend, servants fees, and other expences of labouring the ground and winning the corns; but refused to allow any deduction for the entertainment of themselves and families; and repelled the defence of *bona fide percepti & consumpti*, in regard of the preceeding excommunication: And as to the rents uplifted by them from their tenants, they decerned against them

them and the tenants conjunctly and severally therefor. Durie, 26th June 1629, king's advocate *contra* excommunicates.---- In a process at a minister's instance for stipend, founded upon an old decret of modification and locality, it was pled for the defender, That some years ago he had obtain'd a decret of valuation of his tiends, wherein they were valued at a less duty than the proportion of the stipend imposed upon his lands by the old decret of locality: And tho' his decret of valuation stands now reduced, by the oversight of not citing the minister, yet, while it stood, he could be liable to no higher duty than conform thereto, and that he was at least *bona fide possessor*. The Lords repelled the defence of *bona fides*, in respect of the minister's standing decret of modification and locality. Fountainhall, Forbes, 7th July 1708, Reid *contra* Maxwell.---- A wife's right in lands constituted by infestment, taken in terms of her contract of marriage, is so effectually extinguished by the husband's death, within year and day after the marriage, that it does not afford her even a colourable title of *bona fide* possession to make *fructus perceptos & consumptos suos*; tho' the infestment proceeded upon a new right granted to the husband by his superior, and contained no clause bearing relation to the contract of marriage. Durie, 16th November 1633, Grant *contra* Grant.

A DONATION by a husband to his wife being revoked by a posterior donation to the children, in accompting for the *interim* profits, the wife was considered as a *mala fide possessor*, because she knew of the right made to the children; for, tho' in every case private knowledge infers not *mala fides*, the case of a mother knowing the right of her own children is singular, seeing she was thereby obliged to have sought tutors, and preserved the right. Stair, 20th November 1662, children of Wolmet *contra* Douglass and Cunningham.---- A relict was decerned to repete rents of lands which were provided to her in liferent, in respect she had consented to the alienation thereof made by her husband in favours of the pursuer. Durie, 22d March 1628, *contra* Chisholm.

Private knowledge of a preferable right.

A PARTY possessing without interruption, by virtue of a posterior infestment, being pursued by a party having a prior infestment, is safe *quoad præterita* before the interruption, as being *fructus bona fide percepti & consumpti*. Durie, 26th January 1636, Borthwick *contra* Ker. Durie, 9th March 1624, Monipenny *contra* tenants of Lunbenny.---- In a reduction of a feu *ob non solutum canonem*, Found the defender was *in bona fide* not to pay the same, having the first disposition of the superiority from their common author, tho' the pursuer was first infest, and the pursuer having done nothing upon his right to make interruption. Dirleton, 14th December 1676, Earl of Argyle *contra* Lord M'Donald.---- An adjudication with a decret of mails and duties against a person after he was year and day at the horn, but, before his liferent escheat was gifted, sustained as a title of *bona fide* possession to the adjudger, till he was interpellated by general decret of declarator of the liferent escheat. Forbes, 26th November 1712, Douglass *contra* Chatto.

If a preferable infestment without interpellation will induce *mala fides*.

Reduction
of the author's
right, if it will
induce *mala*
fides against
the acquirer
without inter-
pellation.

Defunct's
goods intro-
mitted with
and applied
before his e-
scheat was gif-
ted.

One heir por-
tioner intro-
mitting with
the whole
rents, believ-
ing the other
dead.

Minor qui non
tenetur placita-
re, is a *bona fi-*
de possessor,
tho' his right
should be re-
duced after
majority.

Bona fide pos-
session of tiends.

BONA fides was found to defend a tacksmen of tiends from by-gones, tho' the fetter's right was reduced in parliament. Stair, 19th July 1664, Douglass *contra* Ld. of Wedderburn.

In a special declarator at a donatar's instance against the rebel's relict, it was alledged for the defender, That she consumed and disposed of some part of the goods acclaimed for the defunct's funeral expences, her mournings, and maintenance of the family till a term, and the goods were so employed before the gift or declarator, and the defender was in *bona fide* to do so, not knowing of the rebellion. The Lords sustained the relict's *bona fides*. Marcus (*Escheat*) March 1686, Lady Eccles *contra* Mr. James Douglass.

In a pursuit for the half of the bygone mails and duties, at the instance of one heir portioner against another, the defence was, That the pursuer having gone to Barbadoes, and being reputed dead, I served sole heir, and the by-gones are *bona fide percepti & consumpti*. Answered, The presumption lies for the pursuer, That he was still alive, and his father appeared before the inquest, and protested accordingly. The Lords repelled the defence. Fountainhall, 12th February 1697, Cockburn *contra* Robertson.

THE Lords having found a comprising extinct by intromission within the legal, and yet refusing to turn the defender, being minor, out of possession, because of the maxim, *Minor non tenetur placitare, &c.* In a pursuit after his majority, he was found to be a *bona fide* possessor *quoad* the bygone rents. Fountainhall, 9th December 1684, Falconer *contra* Kinnier.

AN heritor possessing his own tiends by virtue of a tack from another, as tacksmen, found to be *bona fide possessor*, until interpellated by the real titular. 25th June 1731, Sterling of Herbertshire *contra* Feuars of Denny.---In a pursuit against feuars at the titular's instance, for the tiends of their lands intromitted with by them, the defence pled for by-gones was, That they had been in use, past memory of man, to pay a certain duty, in name of tiend, to the minister of the parish, presumed to have had a title, since no other titular did appear; and therefore, *quoad* the residue, they were *bona fide* possessors. Answered, Ministers have a right to maintenance out of the tiends, but cannot be presumed titulars, especially since the act 1690, giving to the patron the small share of tiend that then remained with the clergy; and the receipts of tiend-duty taken from the minister by the heritors destroy this presumption, bearing, *Tiends payable to him the minister out of the lands*; so that the receipts do not so much as insinuate that the minister was titular, or had a power to discharge the whole tiends. Found, That the sums paid to the minister do not exoner the heritors from paying the remainder of their tiends to the titular; and found them liable for forty years preceeding the citation. 25th June 1731, Sterling of Herbertshire *contra* feuars of Denny.---This decision was reversed by the house of peers, and payment to the minister for forty years was sustained as *bona fide* payment *quoad* the whole tiends, which seems to be reasonable, for the heritor must uplift the tiend, to save it from perishing in the tenants

nants hands, and it would be hard to oblige him to be another man's factor without a salary.

THE Lords refused to sustain process for byrun duties payable out of the defender's lands, where the pursuer had not been in possession, but kept his process in agitation for an hundred years; but sustained it only from the last wakening, these duties not being contained in the defender's infeftments. Gilmour, January 1666; Lord Justice Clerk *contra* feuars of Coldingham.----- A tack of tiends quarrelled by reduction, as set by a parson after he was deprived, the decret was declared by the Lords to take effect *a tempore litis contestatæ*. Haddington, 2d June 1610, Hunter *contra* Lord Sanquhair.---- In a reduction of a tack of tiends; the Lords did not give it effect from the time of the failzie, *sed a tempore litis motæ* only. Hope (*Reduction*) 4th March 1617, Seaton *contra* Seaton.----- In a reduction of land-rights, it appearing by the pursuer's production that he was clearly preferable, the defender was found liable to accompt for the mails and duties from the citation. Stair, Gosford, 23d February 1672, Gray *contra* Watson.---- In a reduction and improbation of a disposition granted to a woman, and assigned by her to her husband in their contract of marriage, the husband was not found liable for the bygone profits from the citation, but from the time only that clear evidence was brought of the nullity and falshood of the disposition. Stair, 15th July 1675, Fulmarton *contra* Lutefoot.---- The alledgance of improbation, which is ordinary and of course, not being sustained, but reserved, was not found to enduce *mala fides*. Stair, 14th December 1677, Dick *contra* Oliphant.---- An executor nominate being appointed by testament to lay out a sum upon a tomb to the defunct, and having begun the work, was found not to be put in *mala fide* to complete the same by a process of reduction of the testament; and therefore, the expence of the work was allowed out of the first end of his intromissions, tho' the testament was afterwards reduced upon this plain ground, That the testator was *in extremis*, and insensible, when made to subscribe the testament. Fountainhall, 20th February 1712, Moncrief *contra* Monipenny.---- The Lords, according to the circumstances of the case, may sometimes reduce a writ *ab initio*, and sometimes *a tempore litis contestatæ*: Thus they reduced a bond and tack of tiends granted *in lecto*, *a tempore litis contestatæ* only. Auchinleck (*Reduction*) 10th February 1635, Lord Balcarras *contra* Ld. Ardross.

Bona Fide Payment.

FOUND that a tenant was *in bona fide* to pay his mail to his master, altho' it was notour that the master was guilty of high treason; but the process was only in dependance in parliament, and no sentence of forfeiture pronounced. Maitland, 14th May 1555, abbot of Balmerinloch *contra* Grange-Durham.----- A rebel dying after the term of payment of farms of his lady's jointure by a former husband, and

Tenants paying their rents

the tenants having paid their lady thereafter, who was infest; this was found *bona fide* payment as to them, when afterwards pursued at the instance of a donatar to his escheat, only action was reserved to the donatar against the lady, and the tenants ordained to furnish him probation, which might verify her receipt of the farms whenever the donatar should pursue her. Durie, 24th July 1624, donatar of Sir William Stewart's liferent *contra* his lady's tenants. --- Tenants are not *in bona fide* to pay their duties to their master who is in non-entries, after the action of non-entry intended against them, but should suspend upon double pouding. Haddington, 14th December 1622, Viscount of Anand *contra* Scot. --- In an action at the instance of a prelate against intromitters with tiend for payment of the old duty, the lords found this exception relevant, *viz.* That they had paid to their master, who set the lands with the tiend to them for a certain duty, as for stock and tiend undistinguished. Gosford, 24th November 1671, Urquhart *contra* Ld. of Friergrees. --- And this, altho' they had made payment to their master, even after they were cited in this cause, because the tenants could not know what part of their duty to retain upon account of the tiend. Durie 21st March 1628, Murray *contra* intromitters with tiends. --- An exception against a spulzie of tiends, That the defenders had paid their old duty to the minister for the year libelled, by order of the pursuer's chamberlain, sustained, notwithstanding there had been an inhibition execute the year preceeding, seeing it was not renewed for the year controverted. Durie, 13th February 1627, Earl of Linlithgow *contra* Menzies. --- A spulzie of tiends was elided by this exception proponed by tenants, *viz.* That they had paid to their own master, who was heritor of the ground; which the Lords found *bona fide* payment, notwithstanding an inhibition of those tiends served and intimated to them. Durie, 13th December 1627, Hepburn *contra* tenants of Fairflat. --- After inhibition of tiends, the tenants continuing to pay to the person in possession as formerly, their defence was repelled, because there could be no presumption of *bona fides* after inhibition. Durie, 27th March 1628, Lord Blantyre *contra* parishioners of Bothwell. --- A tenant having paid his rent *bona fide* to the deceased heritor's second son, held and reputed apparent heir, in respect that his eldest brother was long absent out of Scotland, and thought to be dead; the Lords sustained the payment as sufficient to exoner him at the instance of one pretending right to the said rent by assignation from the eldest brother. Forbes, 22d February 1711, Terrie *contra* Burnet and Forbes. --- The Lords found, That payment made by a tackfman to the apparent heir who set him the land, and made before any intimation to him of a decret of preference at the instance of a liferentrix who was infest, was made *bona fide*, tho' the process for preference commenced before the sett, whereby the subject was rendred litigious. Bruce, MS. 4th July 1716, M'Gill *contra* Crawford. --- A tenant's exception of *bona fide* payment to another before intenting of the cause, which other he offered to prove heritably infest, was repelled, because the defender had paid two years immediately preceeding the year in controversy to the pursuer's author. Durie, 18th June 1629, Porterfield *contra* Cunningham.

Payment to
a minister af-
ter he had fal-
len from his
right.

PAYMENT to ministers who had fallen from their right, not having obtained presentation and collation, was sustained, because, notwithstanding

withstanding they were allowed to preach, and the heritors were not interpellled by the collector of the vacant stipends. Stair, 10th February 1666; collector of the vacant stipends *contra* parishioners of Maybole.

PAYMENT being made to one confirmed executor *qua* nearest of kin to the creditor, the same was sustained, tho' the creditor was a bastard, and could have no nearest of kin, which the debtor was not bound to know. Durie, 18th March 1626, Paterfion *contra* executors of Paterfion.-----The like, Gosford, 25th July 1676, Thomson *contra* Moubray.----The Lords found, That a debtor to a rebel, whose liferent escheat was gifted, was *in bona fide* to pay him, and accept of the rebel's discharge *quocunque tempore*, before the special declarator; and that a general declarator does not put the rebel's debtor *in mala fide*, the citation being only general at the mercat cross. Newbyth, 10th January 1666, Pennycuick *contra* Lord Rutherford.----The like, Durie, Spotiswood, (*Escheat and Liferent*) 31st January 1628, Ld. Cleghorn *contra* tenants. Haddington, 10th February 1610, Blackburn *contra* Wilson.----Payment *bona fide* of a particular bond was sustained, tho' after intenting of reduction, seeing there was no special reason of reduction filled up as to the bond in question. Stair, 19th July 1662, Montgomery *contra* ----- The purchaser of an estate, upon which there was an infestment of annual-rent, having made payment of the same to an heir who had only a general service, and had not established the infestment in his person, this was not found to be *bona fide* payment, because he might have seen the infestment in the register, and ought to have known the defect of the creditor's title. January 1729, competition betwixt Lord Halkerton and Drummond.----- The relict hath no direct action against her husband's debtors, unless she is confirmed, but only against his executors; and therefore it was found unwarrantable in debtors to pay her a third of their debts without sentence: And, notwithstanding thereof, they were obliged to pay the whole to the executors without any defalcation. Durie, 9th December 1628, Mackie *contra* Dunbar.

AN arrestment being laid in a person's hands in the common edictal way, when he was beyond seas in his majesty's service, and he having also paid the debt before the furthcoming was raised, the arrestment never having come to his knowledge; yet the Lords repelled this defence, and sustained the arrestment. Fountainhall, Dalrymple, 22d July 1701; and 16th December 1703, Blackwood *contra* Earl of Sutherland.----- Intimation of an assignation being made only to a cautioner, the Lords found that the principal was *in bona fide* to make payment to the cedent, so as to liberate him and all the other cautioners, no intimation being made to him. Haddington, 23d February 1610, Lyon *contra* Law.----The like where intimation was made at the mercat cross of the head-burgh of the Shire, which was no regular intimation. Durie, 21st July 1632, Home *contra* Home.

A DEBITOR having transacted with the supposed creditor, and obtained his discharge, his *bona fides* was only found relevant for what

F f

was

Payment made to one who is not the true creditor.

Payment to a creditor denuded, and the conveyance intimate, but not to the debtor personally;

It must be actual and real payment.

was truly paid. Stair, 19th July 1665, Johnston *contra* M'Grigor.
The like, Stair, 14th December 1661, Homes *contra* Bonnar.

BOND of PRESENTATION.

Debitor must
be presented in
terms of the
bond, and in-
struments ta-
ken thereupon.

A PRISONER having given bond of presentation with a cautioner, the Lords found, That tho' the messenger did not attend at the time and place of presentation to receive him, yet this did not excuse the other party's absence; but found that the cautioner, for his own liberation, ought to have presented him at the place and time appointed, and taken instruments, if there was none to receive him off his hand, after the example of using an order of redemption. Fountainhall, 22d November 1695, Pitbladdo *contra* Mayne.

Mora in im-
plementing.

A BOND of presentation found implemented, tho' the debtor was not produced till a day after the time appointed, which being *modica mora* was not regarded, unless the creditor could instruct some detriment by the delay. Stair, 12th February 1663, Earl of Southesk *contra* Broomhall. Stair, 16th November 1672, Kennoway *contra* Davie.—A party having given bond of presentation for a man under caption, and failing to present him at the day, but offering yet to produce him, *cum omni causa*; the Lords granted him a new day. Auchinleck, (*Caption*) 14th, Durie, 22d January 1629, Scrimzeour *contra* Lawson.—A person obliged to present a rebel upon a precise day, betwixt two and three, not having offered him till between seven and eight, being charged for the debt, suspended upon this reason, That their journey was retarded some hours, upon account that the day of presentation was a publick feast day by authority; and that the rebel was carried to the pursuer's house, and offered to him, but he refused to accept of him; and the defender, not being master of the caption, could not put him in prison; the Lords sustained the reason, the suspender giving his oath that the feast was the reason he was not presented at the precise hour, and burdened the suspender to present the rebel, *cum omni causa*, within fifteen days. Harcus, (*Caption*) 3d March 1682, Richard Ockley *contra* Grierson of Lag.

Excuses for
not presenting.

A PARTY having granted a bond of presentation for a prisoner, to present him at a day; and then appearing and asserting, that the prisoner having fallen sick, he was willing again to bind himself to produce him within a few Weeks thereafter, which the creditor refused; the Lords found, That even tho' the cautioner should prove that the prisoner was really sick at the time prefixt, this did not free him, seeing he did not offer to present him when he recovered, and therefore found the cautioner liable. Fountainhall, 12th February 1704, Callender *contra* Bruce.—One being pursued upon a bond of presentation, it was not sustained as a good defence, That presenting the debtor had become *factum imprestabile*, he having been taken prisoner by virtue of another caption; for tho' sickness, death, or other accident, occurring not

not by the debtor's fault, is relevant, if the party be offered so soon as the impediment is removed; this cannot be extended to any impediment by the debtor or his cautioner's fault. Stair, 7th July 1681, Polstead *contra* Scot.

A PARTY having given bond to present one, who was prisoner for debt, by a day, without an expedite suspension, past bill, or sist of execution, otherwise to pay the debt; and having accordingly presented him to the messenger that day, but the party himself producing an attestation that he was enlisted as a dragoon, which, by act of parliament secures him against all personal diligence; the bond was not found fulfilled, seeing the debtor was not presented free of all impediments, to be disposed of as freely as could have been done at the time the bond was accepted of in place of his person. Forbes, 21st, Fountain-hall, 22d July 1710, Henderson *contra* Graham.

Clause to present free of suspension, &c.

BREVI MANU.

STOLN or strayed goods may be recovered summarily without process or sentence, even from possessors *bona fide* who have paid an onerous price. Stair, 7th July 1671, Strachan *contra* Gordons.

Stoln goods may be seized *brevi manu*.

FOUND, That the king may enter *brevi manu* to any part of his annexed property, whereof the feu is not lawful, without any warning or other order. Haddington, February 1598, Ld. of Creech *contra* Murray.

King may enter *brevi manu*, into possession of his annexed property, that had been alienated.

IN a spuilzie of tiends, the Lords found, That altho' the pursuer had no right thereto, and that the defender alone had right to the same, yet the defender could not, *brevi manu*, without warrant of a judge or sentence, enter himself to the possession of the corns which were sown and win by the pursuer from off the lands pertaining to the said pursuer; and that he could not take the tiend at his own hand, without concurrence or consent of the pursuer. Durie, Spotswood, (*Ejection and Spoliation*) Auchinleck, (*Spuilzie of tiends*) ult. January 1628, Nasmyth *contra* Home. — A person having right to tiends, and using inhibition thereon, cannot turn out the possessor *brevi manu*, if he has any pretence of a title. Stair, 27th January 1665, Ld. Berford *contra* Lord Kingston.

Intromission with tiend *brevi manu*.

FOUND, That the donatar to the escheat of a party denounced for a crime, may, *brevi manu*, intromit with the rebel's moveables, but cannot enter to possess his lands, which fall not under single, but life-rent escheat, and so must abide a declarator. Haddington, penult. January 1593, King *contra* Seaton. — Lords, and baillies of regality, having right to the escheat of transgressors, without being accountable to the king, may, *brevi manu*, intromit with the escheat goods without a declarator. Stair, 6th December 1672, Innes *contra* Dow.

Donatar *brevi manu* intromitting with the rebel's moveables.

Intromission
with goods
impledged.

A PEDDLER having left his pack in a creditor's hand, for security of the debt, the creditor, by warrant of a magistrate, caused inventory and price the ware, and disposed upon the same; this was found not relevant: For, the pack being impignorated, the defender could not apprise it summarily, but behoved to take a sentence to point the same. Stair, 3d January 1667, *contra* Brand. --- A tacksmen having, in security of arrears due by him, disposed to his master certain corns, and having further obliged himself to pay the sum at a term, with liberty to the master, in case of failzie, to intromit *brevi manu*; the master was found entitled to intromit at his own hand, without necessity of declaring the failzie by the authority of a judge. Stair, 19th December 1661, Dewar *contra* Countess of Murray.

Intromission
with a tenant's
corns.

THE Lords thought, that where a tenant steals off his corns as soon as reaped to another heritor's ground, the master may reap the rest, and stack them for conservation, but may neither cast them in, nor dispose of them without a decret and formal pointing of the same. Fountainhall, 25th June 1700, Lord Salton *contra* Club.

Custody of
an infant taken
brevi manu.

FOUND that a pupil, tho' above seven years old, cannot be taken *brevi manu* by the tutor from the mother, without authority of a judge, but must be restored again, altho' the tutor's intromission was by the father's express order on death-bed. Colvil, 21st January 1579, Lady Giffane *contra* Ld. Caldwellis.

If a miller
can *brevi manu* seize
corn abstracted.

A MILLER cannot lawfully seize horses and meal abstracted from his miln, contrary to his right of thirlage, upon pretence of the statute of king William giving that power, tho' he prove such seizures to have been customary in the neighbourhood. Durie, 22d January 1635, Menzies *contra* M'Kay. Durie, 14th March 1635, *inter eosdem*. But in a process of spuilzie, in the like case, the defender founding upon the above statute, the Lords sustained the defence as to the sacks of corn, and assolzied the defender from restitution thereof, but found him liable for restitution of the horse. Falconer, 1st December 1683, Thin *contra* Scot.

A miln once
set a going,
cannot be demolished
brevi manu.

A PROPRIETAR may hinder the building a dam upon his ground, without necessity to alledge detriment; but where a walk-miln was once established, and a going miln 48 hours, it was found, That the proprietor upon whose ground the dam encroached, could not, *brevi manu*, without authority of a judge, demolish the dam or miln. Stair, Dirleton, 22d June 1667, Hay of Strowy *contra* fuers.

IF the master can dispossess the tenant *brevi manu*, where he has agreed to remove without warning. See Removing.

BURGH

BURGH ROYAL.

A PARTY suspending a charge to accept of the office of baillie of a royal burgh, upon the act 1469. C. 29th, prohibiting magistrates within burgh to continue longer than a year, as now he had done, the Lords found the reason of suspension relevant. Stair, Dirleton, 2d January 1668, Wilson *contra* magistrates of Queensferry. — The old council yearly at Michaelmas must choose a new council; but that imports not that every person in the council must be changed, but only the *major* part; and these two councils, with the deacons of the trades, elect the provost and baillies, dean of guild, treasurer, and all officers within burgh. Stair, 27th January 1681, Jack *contra* town of Stirling. — No person can continue to be provost, baillie, treasurer, dean of guild, or other officer within burgh, except counsellour, more than two years. *Ibidem*. — A burgh is not obliged to erect deacons of trades, unless where the good of the town does so require. Stair, 20th January 1681, trades of Bruntisland *contra* the town. — The acts of parliament providing, That officers in burghs shall be traffickers, concern only the office bearers, and not the counsellours. 26th February 1736, trades of the burgh of Dumfriesshire *contra* magistrates and town-council.

Set of the
burgh.

THE bakers of a royal burgh being incarcerated by the magistrates for insufficient bread, the Lords refused their bill of suspension, until they gave obedience, considering, that this was a matter of government proper and competent to the magistrates. Fountainhall, 7th July 1696, bakers of Glasgow *contra* magistrates there. — Magistrates may impose a stent for the utility of the burgh, but not otherwise than by calling the whole incorporation, and proceeding with the consent of the *major* part of those who shall happen to convene. Stair, 11th January 1678, town of Aberdeen *contra* Lesk and others.

Government
of the burgh.

THE conveyer, and other deacons in a burgh, have no power to hold or fence courts; but yet they have right to make by-laws for regulating their own corporations. Bruce, 17th June 1715, magistrates of Aberdeen *contra* the deacon conveyer and others.

Dacons
have no ju-
risdiction.

A BURGH royal having feued a piece of ground on the side of the high way leading to their town, for a yearly sum, *pro omni alio onere*, and the high ways leading to the burgh being contained in their charter, but they using to feu a part of them where they were too broad (as in the present case) the vassal, by the *reddendo* of his charter, found not liable to the burghal prestations of watching and warding: And as to quartering, assessments, militia, thirlage, &c. they found, That the lands lay within the territory and jurisdiction of the shire, and so must pay cess, outreck, militia, and other burdens with the shire. Fountainhall, 24th November 1698, town of Edinburgh *contra* Biggar. — An heritor of burgh-lands, not residing within the burgh, was found not liable to the stent for a second minister's stipend, nor for the charges of the commissioners of the burghs for keeping the convention of the burghs. Gosford, 1st February 1669;

Who liable
to burghal ser-
vices and pre-
stations.

Boswel *contra* town of Kirkaldy. ----- No inhabitants can be stented, except burgesſes exerciſing trade or merchandice, and that alenarly for their lands and tenements within burgh. Stair, 11th January, Fountainhall, 22d February 1678, town of Aberdeen *contra* Lesk. ----- Found, That none of the acts of parliament touching the ſtenting of inhabitants within burgh, for defraying the publick burdens, could reach ſuch as go under the denomination of writers, as neither being under the words of *traffick, merchandice, and change*, mentioned in one of the old acts, nor of *rents and boldings within burgh*, in another old act. Fountainhall, 13th December 1695, town of Glasgow *contra* writers there. ----- The burgesſes of a town, tho' he be not *incola*, if he trade, may be ſtented for payment of his majeſty's taxationſ. Dirleton, 16th January 1677, *contra*.

Burgesſes
cannot exerciſe
plurality of
crafts.

FOUND, That within burgh a perſon could not both uſe merchandice and be a craftſman. Hope (*Burrows*) town of Aberdeen *contra* liſters thereof. ----- In a mutual declarator between the merchants and trades of a royal burgh, touching the tradeſmen their keeping ſhops for ſelling ſtaple commodities, the Lords ſuſtained the declarator of the gildry; and found, That the tradeſmen, by our acts of parliament, are expreſſy prohibited to merchandize, unleſs they firſt renounce their craft. Fountainhall, 8th January 1697, Gildry of Stirling *contra* trades there. ----- Some chirurgeons-apothecaries in a burgh royal, uſing alſo the trade of merchandizing, and not being incorporated in any of the trades of that burgh, but being fined by the dean of guild for uſing merchandice, tho' they were only tradeſmen, the Lords found, That they having accepted burgesſes-tickets, with that expreſſe reſtriction, to praſtiſe only *in arte propria*, the magiſtrates and dean of guild might reſtrain and ſtop them from merchandizing, unleſs they renounced their trade. Fountainhall, Forbes, 21ſt December 1711, Dean of guild of Aberdeen *contra* Burnet and others.

Non-reſid-
ing burgesſes.

A NON-RESIDING burgesſes has not the privilege of taking apprentices for the freedom of the burgh or incorporation, and is not entitled to carry on his trade by means of apprentices or others. 1ſt December 1738, incorporation of barbers of Edinburgh *contra* M'Duff.

Monopolies
whereby un-
freemen are
reſtrained
from exerciſing
craft within
burghs.

THE Lords ſuſtained purſuit for diſcharging unfree craftſmen to exerciſe their craft within the burgh; but they declared that this prohibition extended only to their working within the town, but not to hinder them to work within their own dwelling-houſes in the ſuburbs. Durie, 21ſt March 1628, Freemen weavers in Stirling *contra* weavers unfreemen. ----- The act 156, parl. 1592, entitled, *Exerciſe of crafts within ſuburbs adjacent to burghs, forbidden*, does not take place where theſe ſuburbs are within a barony. Stair, Gosford, 21ſt July 1669, town of Perth *contra* weavers of the bridge-end of Perth. But the Lords afterwards altered this interlocutor in part, and found, That the weavers might ſerve any in the landward, but might not come within the liberties of the burgh for taking up the work of the burgesſes. Stair, 4th December 1669, *inter eoſdem*. ----- The Lords found that a craftſman living within a burgh of barony, may work to a burgesſes of a burgh royal, or any imploying him, provided he carry not his made work within the burgh royal to be ſold there. Gosford, 5th July 1671, Ld. Polmaies

Polmais *contra* deacons of Stirling.--- It was found not to be a suburb what was a mile from the royal burgh. Stair, 7th July 1671, Ld. of Polmais *contra* tradesmen of Stirling.

BURGHs royal may summarily seize upon staple ware of unfree-<sup>How this pri-
vilege may be
exercised.</sup> men, and judge thereanent, but may not summarily incarcerate their persons, having only a privilege to charge them to find caution. Stair, 30th January 1663, town of Linlithgow *contra* inhabitants of Borrowstounness.

THE penalty of unfreemen importing goods into royal burghs, is<sup>Unfree trad-
ers.</sup> only the confiscation of goods imported, and reaches only the same when apprehended in the importer's possession; but tho' out of his possession, he is still liable, by way of action, for confiscation of the goods imported, or value thereof, but no further. Stair, Dirleton, Gosford, 7th December 1676, town of Glasgow *contra* unfreemen of Greenock. Stair, 20th December 1678, *inter eosdem*.--- In a process betwixt a royal burgh and a neighbouring burgh of barony, touching the extent and meaning of the act 5th, parl. 1672, concerning the privileges of royal burrows; the Lords found, That, by the said act, the matter of trade is regulated after this manner; that as privilege is given to burghs of barony to import commodities, not importable by them before; so, on the other part, royal burghs are secured from their incroachments, that they cannot import but the particulars allowed to them by the said act, and no others; and that they cannot have the liberty that strangers have, without which liberty there could be no trade betwixt our merchants and strangers. Gosford, 6th, Dirleton, Stair, 7th, December, 1676, town of Glasgow *contra* Burgh of Greenock.

JUSTICES of peace have right to call for the use of town-houses<sup>Magistrates
bound to fur-
nish their
town-house
to justices of
peace.</sup> of royal burghs and head burghs of shires, and the magistrates of such burghs are obliged to make patent their town-house to the justices at all times for their meetings. 1st July 1735, justices of peace of the shire of Wigtoun, *contra* the magistrates of the burgh of Wigtoun.

THE privilege competent to royal burghs of arresting strangers, till<sup>Privilege of
arresting de-
bitors, for debt
contracted
within burgh.</sup> caution be found for payment of accompts taken on within the burgh, is competent to royal burghs only, not to the inhabitants of burghs of barony. Durie, 19th July 1623, Salmon *contra* Lindsay. And only to burgesses who themselves have been the furnishers, and not where they were made assignees by creditors not burgesses. Durie, 1st March 1626, *contra* town of Edinburgh.--- And this privilege is confined to merchant-furnishing, and has no place with regard to any other kind of debts contracted within burgh. Haddington, 29th November 1609, Kincaid *contra* Kincaid. And therefore not to the price of a quantity of victual belonging to a burgess, and sold by him within burgh to a stranger. Gosford, 22d February 1677, Dick *contra* town of Edinburgh.

THE question occurred upon the act 1693, anent communication<sup>Act 1693,
anent commu-
nication of
trade.</sup> of trade, whether mechanicks must bear any share with the merchants, of the tax laid upon burghs of regality and barony. The Lords hav-

120 Butcher. Captive. Cautio judicio fisti, &c.

ing considered the last clause of the act, "ordaining all traders and others having benefit thereby to be stented," found the tradesmen liable, but not in an equal share with merchants, their concern being less and more remote; but found this could not extend to inhabitants who had no trade, but lived on their own stock. Fountainhall, 19th January 1694, baillie of Borrowstounness *contra* tradesmen there.

MAGISTRATES administration of the common good, how extensive. See Community.

PRIVILEGE of arresting for merchant-accompts. See Forum competens.

BUTCHERS.

THE act 7th, parl. 1703, discharging butchers to *bruik or possess by themselves, or others for their behoof, directly or indirectly, more than an acre of land, under the penalty of L. 100 toties quoties, besides the forfeiture of the beasts pastured thereon, and the contraveener's burger privilege*, was found to concern only tacksmen graziers, and not to hinder butchers from using their own property for pasturing of cattle. Forbes, Fountainhall, 3d February 1708, Malices *contra* Ogilvie.

CAPTIVE.

A PERSON being taken prisoner by the enemy, all actions against him do stop till his return. Balfour (*Defender*) 31st July 1546, Home of Blackader *contra* Chirnside.—But execution by horning may go on against him. Sinclair, Ld. Oliphant *contra* Ld. Innes.

Cautio judicio fisti & judicatum solvi.

Cautio judicio fisti.

A CAUTIONER, *judicio fisti*, is freed by producing judicially the defender at any time, and protesting to be free; for thereupon the judge ought again to incarcerate the defender until he find new caution. Durie, 26th November 1633, Lindsay *contra* Fairfowl. Stair, 20th February 1666, *contra* M' Culloch.

A DEFEND-

A DEFENDER who had found caution, *judicatum solvi*, dying before sentence; it was found, That the cautioner was not bound for what might be decerned against the defunct's representatives, Stair, 20th January 1680, Hodge *contra* Story.

CAUTION, as law will, does not import *judicio fisci* & *judicatum solvi*, but only *judicio fisci aut judicatum solvi*; and it was found sufficient to liberate such a cautioner, that he put the party in the provost's hands, who put him in ward; tho' it was urged, That this was only fisting him *judici*, but not *judicio*, which was repelled, because, if the defender is put in ward at any time during the process, the pursuer suffers no prejudice. Stair, 10th July 1666, Thomson *contra* Binny.

A SHIP being adjudged prize before the admiral, and the decreet reduced before the Lords, in a repetition of the cargo, the Lords decerned the defender, tho' no stranger, to find caution *judicatum solvi*, according to the custom of the admiral-court. Fountainhall, 18th February 1696, Goety and Duperow Dutchmen *contra* Elphingston. --- An admiral's decreet being suspended, and turned into a libel, the defender was not obliged to find caution *in initio litis, judicio fisci* & *judicatum solvi*, as is done before the admiralty. Forbes, 14th Fountainhall, 15th February 1710, Lord Ross *contra* Houston.

A PARTY being charged by the baillies of a burgh to find caution as law will, and doing it accordingly, but thereafter obtaining advocacy of the cause, this was found to liberate the cautioner. Auch-enleck (*Advocation*) 1st July 1631, Row *contra* Meiklejohn. --- A cautioner in the admiral-court *judicio fisci* & *judicatum solvi*, was found not liberated by advocacy of the cause. Durie, 16th November 1636, Stewart *contra* Ged.

CAUTIO JURATORIA.

CAUTIO juratoria was accepted from a person of quality, being joined with infeftment of lands, altho' these lands were already much burdened. Colvil, 1588, Lord Forbes *contra* Earl of Huntly. --- The Lords past a suspension upon juratory caution, only for the greatness of the sum. Hope (*Suspension*) 28th November 1611, Ld. Sauchie *contra* Hadden. --- In a removing the *cautio prætoria* for the violent profits being decerned for in course, the party being a poor woman, and offering juratory caution, the Lords, because of the act 39th, parl. 1555, refused to accept thereof; but declared, that they would admit such caution as she could find. Durie, 17th June 1630, Home *contra* Home. Durie, 10th July 1630, Bennet *contra* Porteous. --- A suspender himself having petitioned to discuss upon the bill, the clerk not being satisfied with the caution he offered, the Lords remitted to the ordinary to pass the bill of suspension, or to discuss on the bill, if the charger insisted, or otherwise to take the petitioners

petitioner's oath, that he could not find a better cautioner than the person offered, the petitioner always consigning a disposition of his whole estate in security, and then allowed the ordinary to expedite the bill of suspension. Fountainhall, 6th November 1684, Dobie *contra* Galbraith.---- A suspender having deponed, and consigned a disposition in common form, and the charger craving up the disposition, to the effect he might take infeftment thereupon, because the suspender was *vergens ad inopiam*, and the other creditors, during the dependence, might do diligence, and be preferred to him; the Lords considering the inconveniencies of such a novelty, and that the ancient uniform custom was, that these dispositions were only consigned evidents not to be made use of till the cause were discussed in favour of the charger; they therefore adhered to the former custom, and refused to allow the disposition to be given up, till the event. Fountainhall, 4th December 1696, Livingston *contra* Buchannan.

A BILL of suspension being offered of a charge for payment of a liquid debt, upon this reason, That the charger's father, the original creditor, had got an assignation for security, upon which he had intromitted, and was paid; and the debtor craving to have the bill past upon juratory caution, the Lords divided a new piece of form, which was, to remit to the ordinary on the bills to grant diligence to the presenter of the bill of suspension for recovering the documents of the charger's father's intromission, with this view, that if the alleged intromission were made appear, the bill should be past upon juratory caution. 12th February 1740, Lennox of Woodhead *contra* Napier of Culcreuch.

CAUTIO de RATO.

A GENERAL procuratory granted by a man to his wife to pursue actions, was refused to be sustained by the Lords without *cautio de rato*. Colvil.---- The like, where the husband was furth of the country. Haddington, 5th February 1611, *contra*

In an action, a stranger against a Scotsman, the Lords found, That a procuratory behoved to be produced from the pursuer, being absent, and that *in ingressu litis*, or else present caution to be found. Spotiswood (*Attorney*) 14th February 1627, Pyranine a Frenchman *contra* Ramsays. Durie observes it as if both procuratory and caution were found necessary.---- Yet thereafter, in a like case, the Lords sustained process, the pursuer's procurators either producing a procuratory before litiscontestation, or else finding caution before that time. Spotiswood (*Attorney*) 15th December 1629, Peterson a Dutchman *contra* Captain Alexander.

Cautio

CAUTIO MUTIANA.

A MAN being pursued as acceptor of a disposition *omnium bonorum*, with the burden of all the granter's debts, and the burden bearing this quality, *Provided the debts due do not exceed the value of the estate*, the Lords refused to ordain the pursuer to find *cautionem mutianam*, to refund proportionally, if more debt emerged than the estate would be able to pay. Fountainhall, 23d November 1695, Canon *contra* Canon.— A legacy being left conditionally, *if the legatar follow the executor's advice*, the legacy was found due; but the Lords declared, in case the legatar followed not the executor's advice, he should be liable to refund; but they would not oblige him to find caution for that effect, the condition being so general. Stair, 25th July 1662, Nasmyth *contra* Jaffray.

CAUTIONER.

A PERSON who write a letter to another, desiring him to *de-* When understood cautioner, when *lay Mr. Douglass for the price of the horse till Whitsunday next, and he would see to his paying of it*, found liable as cautioner, *expromissor*; and therefore liable only *subsidiarie*, after discussing the principal party. Marcus (*Cautioners*) June 1681, Home *contra* Lockhart of Ley.— An obligation granted by a third party to a creditor, to cause the debtor pay, or else to pay the debt himself, was found to be *fidejussory* only; and that any exception competent to the debtor was competent to him as cautioner. Fountainhall, 20th January 1693, Doull *contra* Home.— Graham of Mosknow, in the year 1687, *became bound to pay to captain Blair all debts or sums of money, and accompts resting by Irvine of Bonshaw deceast, to the said captain Blair, according to the instructions of the same to be given in by him*. Within the years of prescription of this obligation, Captain Blair's representatives insisted in a process against Graham of Mosknow, for payment of two bonds due by Irvine of Bonshaw to Captain Blair. The defence was, That these bonds were prescribed. Answered *1mo*, That the prescription was interrupted by the aforesaid obligation. *2do*, Supposing the prescription to be run *quoad* Irvine of Bonshaw, Mosknow must be liable upon his own obligation, which is not prescribed. Replied to the *1st*, Taking an additional security from a third party will be no interruption *quoad* the principal debtor, unless done with his concurrence; far less will a general obligation make an interruption, which is not taking a document upon any particular debt. Replied to the *2d*, The defender is not an *expromissor* who takes a debt absolutely and ultimately upon himself; he is only *adpromissor*, liable indeed directly to the creditor, but virtually cautioner, and entitled to relief. Hence every exception competent to the principal debtor must be competent to him; and, if he should pay, he can have no relief: And the creditor has himself

to blame, who allowed the debt to prescribe against the principal, which must operate in favours of the cautioner, equally as if he had granted a discharge; and it is *triti juris*, that every security past from *quoad* the principal, is, *eo ipso*, a liberation *quoad* the cautioner. The Lords sustained the alledgance of prescription. 12th July 1735, Haliburtons *contra* Graham of Mosknow.

In what
cases a cautioner
may remain bound
when the principal gets
free. 1mo, If
the subscription of the
principal be
null.

A BOND found simply null, because not subscribed by the principal, altho' the cautioner did subscribe. Haddington, December 1612, *contra* Crichton.---- A cautioner bound as full debtor conjunctly and severally, was found liable for the whole, tho' the principal was free'd by a legal exception, one nottar having only subscribed for him in the bond. Stair, 8th July 1680, Johnston *contra* Ld. of Romano---- A debt being claimed from a cautioner, it was objected, That the bond was null as to the principal, upon the act 1681, his subscription being only attested by one subscribing witness, tho' two are mentioned in the body of the bond, & *sublato principali corrui accessorium*. Answered, This is but a statutory nullity, which does not take away the natural obligation; nay, the bond, as it stands, is a good foundation of action against the principal, tho' the act 1681 furnishes him an exception against it. The Lords repelled the objection, and found the cautioner liable. Fountainall, 2d February 1700, Hepburn *contra* Nimmo.

2do, Principal free, as
vestita viro.

A CAUTIONER bound, altho' the principal was not, the debt being an accompt subscribed by a married woman without her husband; so that the cautioner could have no relief off the principal. Durie, 28th November 1623, Schaw *contra* Maxwell.

3tio, Free
by prescription.

A MAN having granted bond as cautioner for a tenant, that he should pay his rent, and being charged upon this bond, after the elapse of five years from the removal, the Lords sustained this defence as sufficient to assilzie the obligant in the bond, That the said bond was only an accessory, additional and cautionary obligation, to cause the tenant pay, so that any exception defending the tenant was competent to him; and therefore assilzied him upon the act 1669, about the quinquennial prescription. Fountainhall, 19th December 1695, Doull and others *contra* Home.

4to, By minority.

A CAUTIONER in a suspension being minor, but attested to be sufficient, the attester was found liable for the debt, he knowing that the cautioner was minor, and would be freed *ex capite minorennitatis*. Gosford, 6th February 1672, Earl of Kinghorn *contra* Clieland.

5to, By a
pactum de non petendo.

A *PACTUM de non petendo* made to a principal, frees not the cautioner. Stair, 10th July 1680, Leitch *contra* Haderwick.

6to, Principal not
bound, yet intromitting.

ONE being chosen collector of supply, gave bond with his cautioners to the commissioners, obliging them to make just compt and reckoning, &c. the principal becoming bankrupt, the cautioner insisted in a reduction of the bond, upon this head, That it was null as to the principal debtor, there being no witnesses design'd to his subscription, and therefore not binding as to him the cautioner, which the Lords sustained, notwithstanding the principal having acted as collector, and uplifted, was truly bound to accompt for his intromissions. 8th February 1728, Sir Hary Innes *contra* commissioners of supply.---- Action was sustain'd against cautioners in a second act of curatory, altho' there was a prior, wherein the curators were chosen, and had accepted,

ted, and the act never reduced, nor they removed; and yet the second choice seem'd thereby null, and therefore the cautioners not bound: But the cautioner here was conven'd for payment of a particular sum intromitted with by his principal, and which he was bound to accompt for. Durie, 5th December 1627, Rollock *contra* Crosbies.

AFTER the triennial prescription, a compt and reckoning was brought against the representatives of a drawer in a tavern, and against his cautioner for wine intromitted with by the defunct, and it was offered to be proved by the cautioner's oath, that he heard the defunct acknowledge he was owing to the pursuer the sum libelled; the Lords found it not relevant to prove the debt by the cautioner's oath, in regard it would not be probative against the defunct's representatives, and so the cautioner would be obliged to pay the debt without relief. Dalrymple, 9th November 1699, Herdman *contra* Borthwick.

7mo, Where there is no proof of the debt against the principal.

AN executor's cautioner was found only bound for what was contained in the inventory, but not for concealments. Haddington, 25th May 1593, Guthrie *contra* Waddel.----- A cautioner in a contract of marriage being charged by the relict, to imploy 1000 merks upon annualrent for her liferent use, in terms of the contract, conigned the money at the bar, and insisted the relict should find caution to restore the sum to him after her decease; the Lords found the relict was not obliged to accept of this offer, nor find caution, but that the cautioner was bound himself to imploy in terms of the contract. Durie, 2d July 1628, Nasmyth *contra* Menzies.----- A cautioner in a contract of marriage being obliged for infesting the wife in certain annualrents, which her husband had out of lands redeemable, conform to the contract; and that how oft the lands should be redeemed, the money should be imployed again for her liferent use, was not found to be liberated from the said obligation, tho' the wife was once infest in these annualrents, and had afterwards consented to the renunciation made by the husband, in respect the said renunciation was a necessary deed, and could have been forced by an order of redemption, and, after redemption, it was incumbent on the cautioner to see the money reemployed. Durie, 4th July 1628, Hamilton *contra* the bishop of Galloway's relict.----- The cautioner of a factor upon a sequestred estate found liable for annualrent of the factor's intromissions, as factors are liable by the act of federunt 1690, altho' the bond of cautionry did not bear annualrent. Forbes, 23d January 1711, creditors of Park Hay *contra* Falconer.

Cautioner; how far liable.

CAUTIONERS for a collector of the customs, bound conjunctly and severally with him, That he should make just compt, reckoning and payment of his intromissions to the tacksmen, and do exact diligence for bringing in thereof monthly, quarterly, or oftner as required, were found liable for what the collector came short thereof in his accompts, tho' the tacksmen had not used any diligence against him for payment all the last three quarters of his management. Forbes, 20th February 1707, Wallace and Baillie *contra* Lauders and their husbands.----- A cautioner for a publick collector's cashier, being bound in this form, That the cashier should accompt with the collector monthly, quarterly and yearly, and after discussing the said cashier himself, the cautioner being charged for his arrears, who suspending on this reason, That the charger had not called the cashier to accompt, in the

terms aforefaid, but had delayed till he broke; the Lords repelled the reason of fufpenfion. Fountainhall, 18th June 1706, Hamilton and his affigney *contra* Calder.

If a cautioner may plead in the creditor's right, without being affigned to the debt.

A CREDITOR of a tenant having arrested the farms in a third party's hand, a cautioner for the tack-duty appeared, and pled preference upon the right of hypothec. Answered, The cautioner cannot plead upon the hypothec, not being affigned thereto by the master. Replied, The master is, *ex bona fide contractus*, bound to lend his name to the cautioner for security of the rent, and the cautioner has an interest to plead in the master's name and in his right for preference, that the subject of the master's payment be protected from the tenant's creditors; the Lords found that the cautioner not having paid the rent, nor got any assignation thereof from the master, had no right to the hypothec, and therefore preferred the arrester *in hoc statu*. 24th January 1735, Garden of Troop *contra* Dr. Gregory.

Cautioners how liberated.

FOUND that a cautioner for a factor who was popish, was free with regard to all the factor's intromissions, after the third act, parl. 1700, declaring papists incapable of any such office. Fountainhall, 28th February 1708, Frazer *contra* Abercrombie.

Cautioners intitled to relief.

Diligence competent to cautioners for relief.

A TENEMENT being disposed for relief of cautionry, the Lords found that it was no title of possession, unless the cautioner would instruct that he had paid the debt, and so had purify'd the conditional indentment, or that he was distressed: And the bond of relief did not bear that he might enter to the possession ay and while he were paid. Fountainhall, 1st February 1687, Montgomery *contra* Miln. ——— A cautioner being distressed, and confirming executor creditor to the principal debtor, and the relict, as a posterior executrix creditrix, competing, and alledging, that he had no right till he paid; and he answering, That he was willing, with the goods confirmed, to pay the debts for which he was bound; the Lords sustained his confirmation upon the clause of relief, provided he produced a right to the debt, or a discharge thereof before extracting. Fountainhall, 4th February 1681, M'Kenzie of Suddie *contra* Countess of Seaforth. ——— An apprying found null, because led, not by the creditor, but by the cautioner upon his bond of relief, before he was either distressed or had made payment. Home, November 1686, Dickson *contra* Govan and Miln. ——— A cautioner in a confirmation, having pursued the executors to relieve him of his cautionry, and to find caution for that effect, because they had wasted the goods confirmed, and were *vergentes*; the executors were ordained to compt and reckon upon the goods confirmed, and to instruct how the goods had been imployed, before answer to the pursuer's claim of new caution. Durie, 19th January 1627, Thomson *contra* Heriot. ——— Found that a party seeking an adjudication upon a bond of relief, when as yet there was no distress, was well founded in law, tho' it was but a conditional obligation and *dies incertus*; and therefore allowed the decret of adjudication to be extracted, but to go out with this quality, that it should not take effect till distress. Fountainhall, Falconer, 20th November

vember 1685, Burnet *contra* Veitch. ----- In a competition betwixt two arresters, the Lords thought that an illiquid fact was not a ground whereupon arrestment could be used, but if it were made liquid before furthcoming, the arrestment stood good; and therefore one of the parties having paid, and acquired in a debt for which he had been cautioner for the common debtor (and had his bond of relief) before the competition in the furthcoming; they found that this liquidation was to be retrotracted to validate his arrestment, as much as if the debt had been liquid at the date of the arrestment. Fountainhall, 9th February 1704, Drummond *contra* Lord Prestonhall.

A CHARGE of horning was found sufficient distress for a cautioner to seek his relief, altho' nothing further was done thereupon, nor had the cautioner paid the debt. Durie, 28th July 1625, tenants of Hayning *contra* Scot. ----- The registration of a bond was found sufficient distress, whereupon a cautioner might seek his relief against the principal, he being suspected of being *vergens*. Durie, 26th March 1628, Vans *contra* Law. ----- The like, Colvil, Stevenson *contra* Frazer.

What distress sufficient to entitle the cautioner to relief.

A BOND of relief was found to be the ground of a charge, tho' no distress was produced, it bearing an obligation to pay at a certain term. Gosford, 7th July 1668, Paton *contra* Paton.

Relief, in what cases it may be demanded without distress.

A PRINCIPAL was found bound to relieve his cautioner, and pay him all annualrents since the time he paid, tho' the bond bore no annualrent; and the clause of relief carried only to relieve of the premisses in the bond, without mention of cost, skaith, damage, interest, &c. Durie, 4th December 1629, Ld. Cockpuil *contra* Johnston. ----- Altho' bonds of relief carry all cost, skaith, damage, &c. yet the Lords interpreted the same only to extend to the principal and annualrents, so that, altho' a cautioner be denounced, his escheat fall, his lands be comprised, &c. yet the principal will be only obliged as above. And yet in a case, where the cautioner's lands were comprised for the principal sum, annualrent and penalty, sheriff-fee, &c. in a pursuit for relief, the Lords ordained the principal to refund to the cautioner all that he had justly debursed, and that upon the cautioner's own oath. Auchinleck, (Caution) 19th March 1630, Ld. Lundie *contra* Earl of Argyle. ----- No cautioner can legally claim expences given out by him after a decret is recovered against him, because they were needless and wilful, so that, being once decerned, he ought to have paid the debt. Fountainhall, 31st January 1678, Mattheson *contra* Fisher. ----- A cautioner having paid the debt, in a competition betwixt him and the donatary, to the principal debtor's bastardy, the Lords found, That the penalty of the bond must be restricted to the sum really paid out by the cautioner to the creditor. Bruce, 22d February 1715, Bowles *contra* Johnston.

Extent of this relief.

A CAUTIONER against whom sentence had past, and who had thereupon paid, was found to have no relief against the principal, because the principal was not called in that decret; nor was the distress ever intimated to him; and, if he had been called, he had a good plea to make, namely, compensation. Durie, 19th December 1632, Maxwell *contra* Earl Nithsdale.

A cautioner paying, and insisting for relief, is liable to all objections competent against the debt.

Cautioner in a suspension.

In a second suspension of the same debt, a new cautioner is not required

AN assignee charging, and the letters suspended upon caution, he having reponed the cedent, and the cedent charging of new, the party obtained suspension without caution, in respect of the first cautioner, who was declared to stand bound to the cedent being retrocess'd. Haddington, 23d January 1620, Kinninmouth *contra* Ld. Craigiehall.

In what cases is the cautioner affoizied, while the letters are found orderly proceeded against the suspender?

LETTERS being suspended upon this reason, That the charger had not performed what he was bound for to the suspender, and the charger having, at discussing, implimented his part, the Lords, nevertheless, suspended the letters *simpliciter quoad* the cautioner; and found, That he ought not to be burdened with the debt, because the suspender had reason to suspend, the charger not having performed his part at the time of raising the suspension. Spotiswood (*Suspension*) 5th December 1633, Weir *contra* Baillie. ---- In a pursuit against the attester of a cautioner in a suspension, the Lords found, That the pursuer being under sentence of death when the charge of horning was given, the said charge was null, seeing the debt came under the charger's effcheat. This was found relevant to affoizie the cautioner and his attester, altho' that now the time of this process against the attester, the charger had gotten a remission, which being, in effect, a new title acquired from the king, and not being in his person the time of the charge, and raising of suspension thereof, he had no right to the sum. But the author adds, The Lords were of opinion, that no reason of of suspension, suspensive of the debt only, such as arrestment and the like, could exoner the cautioner, but only such reasons of suspension as did quite extinguish the debt, or were exclusive of the charger's title. Home, March 1682, Falconer, 2d January 1683, Somervell *contra* Coult. ---- In a suspension upon a reason of compensation, the charger proposing, and thereafter proving recompensation, the Lords found the letters orderly proceeded against the principal party; but suspended them as to the cautioner, in respect the ground of recompensation was only made liquid after the suspension. Falconer, 27th November. Home, December 1685, Moir *contra* Johnston. ---- A minor having suspended his own bond upon the head of minority and lesion, and before suspension was gotten discussed, he becoming major, and then, granting a bond of corroboration of the debt, which precluded his own objection; the Lords found the cautioner in the suspension free, seeing the principal was overtaken by his own deed of ratification, subsequent to the suspension, which could not prejudice the cautioner, who was *in bona fide* to engage for him. Fountainhall, 5th July 1706, M'Dowal *contra* Maxwell. ---- A suspended decreet being turned into a libel, and a day assigned to the suspender to depone upon the verity of the debt; and upon his failing to depone, the letters being found orderly proceeded; the cautioner in the suspension was, notwithstanding, found liable to pay the debt. Fountainhall, Forbes, 30th November 1709, Dunbar *contra* Muirhead. ---- The Lords found, That a charge on a bond of relief, tho' before distress, was noways unwarrantable nor unjust; and therefore, the principal having suspended such a charge, found, That the cautioner, and

and his attester in the suspension, stood bound to the charger. Fountainhall, 4th February 1704, Kennedy *contra* Eliot. --- When a decret upon a registrate bond is turned into a libel, as being registrate in a jurisdiction where the debtor dwelt not, the cautioner in the suspension was liberated of course. Fountainhall, 8th November 1692, Schaw *contra* Kennedy.

A CAUTIONER in a suspension being charged for the expences modified in the decret of suspension, was assilzied therefrom; in respect he was not expressly bound for the same in the bond of cautionry; but the Lords recommended to a committee of their number to draw a formula of a bond of cautionry in suspensions, according to the old act of federunt 1613, observed by Spotiswood, *voce* (*Suspension*) to be the rule in time coming, That cautioners in suspensions might be liable not only for the sum in the charge, but for the expences modified at discussing the suspension. Forbes, 30th November 1709, Dunbar *contra* Muirhead. see act of federunt, 27th December 1709.

Cautioner in a suspension, how far liable.

In a suspension of a decret of poinding the ground, the creditor having obtained decret of suspension; the cautioner who had enacted himself to pay the bygone annualrents, was notwithstanding found only liable to warrant the infestment of annualrent, by giving access to the creditor to poind the ground, but that he could not be personally liable for the bygone annualrents, it being a real action, having no personal conclusion against the suspender himself. Durie, 18th February 1623, Blackburn *contra* Drysdale.

Cannot be further liable than the suspender.

A THIRD party upon appearing for his interest in a suspension, being preferred to the charger, and applying to the Lords to have warrant for letters of horning against the cautioner in the suspension, seeing the bond of cautionry, as usual, was in favours of the charger only; the Lords considering, that the design of the bond of cautionry is, that the sum charged for should be secure in the event that the same is found due; therefore they granted warrant for letters of horning against the cautioner for payment of the sums decerned, and made an act of federunt, That, in time coming, there should be an addition to the stile of bonds of cautionry, and that the cautioner should be bound to pay, or perform to the charger, or to any other person found to have best right, in so far as the suspender should be found liable. Dalrymple 21st November 1717, Bennet and her husband supplicants.

To whom liable.

Attester.

ALL the attester is presumed to undertake is, that the cautioner is holden and repute sufficient; so that if the cautioner thereafter become bankrupt the attester is not liable. Stair, Dirleton, 17th December 1667, Paterfon *contra* Homes. --- A man having attested a cautioner in a bond of presentation of a party under caption, the Lords found that these obligatory words (*and obliges myself for the same*) which are now commonly subjoin'd to attestations, import more than the cautioner his being habite and repute sufficient at the time of the attestation; and that it also burdens the attester, to prove that he was actually

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and

and really solvent at the time. Dalrymple, 6th, Fountainhall, 16th December 1698, Dempster *contra* Bayn. Yet some years thereafter, in a case existing before the act of sederunt 1709, a party having attested the sufficiency of a cautioner in a suspension, and also added the above-mentioned words, *and I oblige me, my heirs and executors for the same*, the Lords found the attester no further liable, than to prove that the cautioner was holden and repute solvent at the time of his attestation. Forbes, 19th, Fountainhall, 20th July 1710, Ramfay *contra* Spalding.

CAUTIONERS *when liable in solidum. See Solidum & pro rata.*

CAUTIONER *obtaining eases must communicate. See Debitor and Creditor. Mutual relief among co-cautioners. Ibid.*

PROPORTION *of this relief. See Solidum & pro rata.*

CREDITOR *bound to assign upon payment. See Debitor and Creditor.*

BOUND *also to communicate every separate security he has for his debt. Eod. Cannot liberate the principal debtor after imprisonment. Eod.*

BENEFIT *of discussion. See Discussion.*

SENTENCE *against the principal, if res judicata against the cautioner. See Res inter alios.*

STRANGERS *pursued here must find caution judicio fisci. See Forum competens.*

Charge to enter Heir.

General
charge.

REDUCTIONS, declarators, and other real actions that have no personal conclusion against the heir, require no general charge to enter heir, which is only necessary in order to make the heir personally liable. Stair, 26th June 1667, Dewar *contra* Paterfon. — Therefore, it is not necessary in a poinding of the ground. Stair, 2d January 1667, Oliphant *contra* Hamilton. — Nor in a process for the avail of marriage pursued against the ground. Durie, 14th November 1635, Dickson *contra* Donatar. — For the same reason, probation of a tenor, being a declaratory action, was sustained upon calling the apparent heir, without charging him to enter. Stair, 12th December 1672, Brodie *contra* Douglass. — An order of redemption may be used against an apparent heir without necessity of a charge to enter heir. Durie, 11th December 1638, Finlayson *contra* Weemys.

A PARTY

A PARTY having first given a general charge to enter heir, and thereafter, but before sentence, a special charge to enter to some particular lands; the Lords reduced the comprising *ope exceptionis*, and without necessity of reduction, because of the inviolable form, That a general charge must precede, and next a sentence against the party, which must next be succeeded by a special charge in order to a comprising. Durie, 15th February 1627, Earl Cassils *contra* M' Martin. — But it was found to be no objection, That the special charge was raised and executed before extracting the decret of constitution, being after the decerniture. 1st December 1738, creditors of Catrine *contra* Baird of Cowdam.

THE Lords sustained this objection against an adjudication, That the lands were not filled up in the special charge at the time of pronouncing and extracting the decret of adjudication, and found the same relevant to annul the adjudication *in totum*. 1st December 1738, creditors of Catrine *contra* Baird of Cowdam.

AN adjudication without a special charge, was sustained in a competition, tho' the debtor was not infest, he being served heir in special, and also had charged the superior to infest him. Durie, 25th November 1629, Dickson *contra* Ker. — In a competition anent a right of reversion, betwixt a creditor who had adjudged the same from the apparent heir of the reverser, and a posterior heir passing by the apparent heir, and connecting his title by a general service to the reverser, it was objected against the adjudication, That it was null, the apparent heir not having been charged in special to enter heir to the subject in question. Answered, The apparent heir was charged in general to enter, which being suppletory of a general service, was a sufficient foundation of the adjudication as to all rights that can be carried by a general service. Replied, A general charge is intended to supply a passive title only, for such is the very stile of the charge, but does not supply either a general or special service; a special charge is necessary to that end to enter heir to lands and others where the debtor died infest, which is a special charge, properly so called, and which supplies the want of a special service; or to enter heir to heritable rights where the debtor died not infest, which is termed a *general special* charge, and which last kind of charge, and that alone, supplies the want of a general service. The Lords found the adjudication null. 10th July 1737, Monro *contra* creditors of Easterfearn.

CITATION.

PROCESS is not sustain'd upon any debt of the defunct's, unless the whole heirs portioners be called. Stair, 18th January 1672, Master of Salton *contra* Lord Salton. — Yet the Lords sustained process against one of more heirs portioners, altho' the representatives of the others were not called. Newbyth, 23d June 1666, Viscount Arbuthnot *contra* Keith.

A RELICT having transacted with her husband's heirs, who were mean obscure persons, and, for a gratuity, getting a disposition to his whole succession, but giving back-bonds to the heirs, obliging herself to relieve them of all debts her husband was owing, and of all damage and expence they could incur that way; and she being pursued by a creditor of the husband's upon the passive titles, as *empr̃ix hæreditatis*, but alledging, That the heirs must be called to whom she granted the back-bond, since they might have instructions of payment, and other defences which she knew nothing of; the Lords sustained process against her without necessity of calling the heirs of line. Fountainhall, Forbes, 3d July 1711, Walwood *contra* Scougal.

In a process
against a mi-
nor, who must
be cited.

IT is sufficient in an imprecation to summon a minor personally, and his tutors generally at the mercat-cross. Haddington, 1st February 1610, Lord Elphinston *contra* Bruce.----A decret pronounced against a pupil was reduced, because his tutors and curators were not called for their interest, altho' it was notour he had none. Maitland, 6th March 1573 Chrichton *contra* Ld. Rossie.----A father-administrator need not be specially cited, 'tis sufficient that tutors and curators are cited in general. Durie, 8th March 1626, Earl Kinghorn *contra* Collace.-----A wakening against tutors being only executed against one, and not against the other co-tutors, who, it was alledged must be called to the wakening, as well as to the principal summons; the Lords allowed the pursuer to cite them *incidenter cum processu*, provided they were cited any time before advising of the cause. Fountainhall, 13th January 1686, Lockhart *contra* Ellies.----In a removing against a father and his son, the son being minor, and the father summoned as administrator to him, this was found sufficient, tho' the tutors and curators were neither generally nor specially summoned, and that he had other curators. Durie, 17th July 1630, Ld. Lie *contra* Porteous.----The Lords turned a decret into a libel, it being against a minor, and his curators not cited with him *in initio litis*, upon two diets, but only cited *cum processu*, by virtue of an incident to compare upon two days warning. Forbes, 28th December 1705, Gavin *contra* Montgomery.----Yet a minor being summoned without citation of his tutors and curators, the Lords refused to cast the summons, but assigned a day to the minor to get himself authorized with tutors or curators. Haddington, 20th February 1624, Fairney *contra* Ayton.----Found no necessity to warn the curators of a woman minor, she being married, and her husband summoned. Hope, (*Minor*) 2d July 1622, French *contra* Frenches and Cranston.----A suspension against a minor was sustain'd, altho' it was execute against the charger only, and not against his tutors and curators, neither was there any warrant in the suspension to summon them. Durie, 1st March 1627, burgeses of Glasgow *contra* Lord Lorn.

In extrajudi-
cial steps a-
gainst minors,
who must be
certiorate.

TUTORS and curators need not be certiorate in extrajudicial acts, such as warnings, but must be called in the summons of removing following thereupon. Durie, 12th July 1628, Bennet *contra* Turnbull.----In the declarator of the double avail of a marriage, it was found, that requisition, and offer of a party may be made to a minor without warning his curators. Durie, 3d, Haddington, 4th July 1622, French *contra* Cranston.----The like as to a requisition at the instance of

of a wadsetter. Durie, 6th March 1639, Urquhart *contra* Barclay.
 --- In a declarator of redemption against a minor, the Lords found, That the tutors and curators needed not generally be warned in the instrument of premonition, since they were specially and *nominatim* warned. Durie, Hope, (*Wadset*) 17th December 1629, Ld. Carnoutie *contra* Ld. Techmuirie. --- Found sufficient to arrest in a minor's hands, without necessity to execute the arrestment against his tutors or curators, either personally, or by leaving a copy at the cross, tho' these ought to be cited in the furthcoming; and here a posterior arrester, who had arrested in the curators hands, was competing. Marcus, (*Arrestment*) November 1687, George Robertson *contra* Robert Ker.

A TUTOR's factor being, by contract with the constituent, obliged to do all for the pupil that the tutor himself was bound to by law; the Lords found, That the tutor needed not be convened in a process of compt and reckoning at the pupil's instance. Durie, 24th July 1629, Slewman *contra* Wardlaw. --- The Lords sustained action of compt and reckoning against the accepting tutors nominate, without calling the rest who did not accept or act. Forbes, 23d June 1705, Murrays *contra* Murray. --- But in a pursuit against a tutor's heirs they would not sustain process, till the co-tutors were called; for the heirs could not know the administration, or how to accompt. Stair, 2d December 1668, Seton *contra* Seton. --- Found, That a minor ought to call his whole tutors or curators, either at the beginning or *cum processu*, to the effect the defences of every one may be communicated to all, tho' every one may be decerned *in solidum*. Marcus, (*Tutors*) March 1684, Lord Napier *contra* Sir William Nicolson. This was adhered to as to the representatives of dead tutors. 2d December 1684. And the like was decided, January 1685, Dalgarno *contra* Henderson.

A COMMISSARY cannot decern an executor-dative *ad omiffa*, except the principal executor be first cited thereto. Durie, 12th March 1631, Duff *contra* Alves. Durie, 14th February 1622, Bayn *contra* Forbes, 18th July 1706, Lees *contra* Dinwoody. --- Yet a testament-dative *ad omiffa* was sustained, the principal executors, by the edict, being generally cited to hear executors *ad omiffa* decerned, tho' there was no personal citation. Durie, 28th June 1623, White *contra* --- But in processes against debtors after confirmation, the principal executors need not be called. Durie, 5th December 1627, *contra*

In an action against executors, the exception, That the heir of one of the co-executors was not called (the office being indivisible) was found relevant, unless the pursuer would alledge, that the executors convened'd had intromitted with as much as would pay the pursuer. Spottiswood, (*Execution*) Durie, 18th July 1628, Peacock *contra* Peacocks. --- Formerly it had been found, That where one of two executors is dead, the other may be pursued as such, without calling the heirs or executors of the other. Maitland, 26th February 1567, Lady Lovat *contra* Frasers.

Exoneration. AN executrix when pursued founded her defence upon a decret of exoneration; to which the pursuer answered, That he was not called thereto, and the executrix knew of his debt, having paid part of it; this was repelled, and the defence on the exoneration sustained. Durie, 16th July 1629, Tailzifer *contra* Wilson.

Process against cautioners. A PARTY having fully discuss'd an executor, and thereafter insisting against the cautioner, in which process the executor was also called for his interest, but he deceasing after some steps made in the cause, the Lords found no necessity to summon his representatives, or to transfer the process, the executor being no necessary party, as being discuss'd before. Durie, 5th December 1623, Rocheil *contra* his debtor's executor.

Process against a woman *vestita viro*. FOUND no process against a woman who was married after executing the principal summons, because her husband was not cited for his interest in the second summons of continuation, which he might have been, upon supplication to the Lords to grant warrant for that effect. Durie, penult. June 1627, Baillie *contra* Robertson. --- A woman clothed with a husband, having committed ejection, and thereafter being pursued for the same in her widowhood; the Lords sustained the process against her, without finding any necessity to summon the heirs and executors of her deceased husband (altho' he himself behoved to have been called, if the action had been pursued against her in his lifetime) seeing the fact was only pursued against the woman herself as committer, *& noxa caput sequitur*. Durie, 18th July 1622, Caldwell *contra* Caldwell.

Process upon delinquencies. MAGISTRATES being pursued for not taking a rebel, no necessity was found to summon the rebel himself to this pursuit, wherein the magistrate is conven'd *ex propria culpa*, the rebel being decerned before; and because here the principal debtor had no interest, as in a forthcoming he has. Durie, 25th June 1629, Ross *contra* the bailties of Inverness. --- The like, a baillie being charged to take a rebel, and disobeying, a process laid against him for the sum. Durie, 22d November 1621, Slater *contra* Ross. --- An inquest may be pursued for error, tho' some of them be absent. Erskine, July 1573, Ld. Ruthven *contra* St. Colm. --- Process may go on against any one of an inquest for error, without calling the rest. Maitland, 3d August 1554, the Queen *contra* Ld. Caprington.

Process at a legatar's instance. A SPECIAL legatar cannot convene a debtor without calling the executors of the defunct, because they may alledge reasons why the legacy ought not to be paid, as that *debita excedunt bona*, &c. Durie, 10th March 1627, Forrester *contra* Clark. But he need not call the other legatars. Durie, 31st January 1639, Dundas *contra* his good-fire's executors.

Process at an assigney's instance. A COMPRISER of the reversion, redeeming the lands from the wadsetter, needs not call the reverser nor his heirs. Durie, 17th December 1629, Ld. Carnousie *contra* Ld. Techmuirie.

CITING of tenants is not sufficient where the master is most concerned, as in obtaining a decret of locality. *Process of locality.* Gilmour, 16th January 1663, Earl Roxburgh *contra* Kinnier.

IN an action for a pension against the chamberlain of a person of quality, the Lords found that there was no need to summon the master *Process for pension.* for the time, nor any to represent him, notwithstanding his chamberlains were summoned to pay the pension. Spotiswood, (*Pension*) 20th January 1627, Weemyfs *contra* Hamilton.

IN a declarator at the instance of an appriser, for declaring another's prior apprising to have been extinct and satisfied within the legal, by *Declarator of extinction or payment.* his and his author's intromission; the defender alledged no process, in so far as concerned the author's intromission, in respect authors are not called. Answered, The defender's apprising not being quarrelled by reduction or improbation, to take away the right, as not good or sufficient, but only by declarator, as being satisfied within the legal; the pursuer needed not to call authors, but if the defender pleased he might cite them *cum processu*, or intimate the action to them. The Lords repelled the alledgance, in respect of the answer. Marcus (*Comprisings*) November 1683, Reidsword *contra* Johnston.

IN a declarator of bastardy it was found sufficient to call the officers of state, and not the defunct's nearest of kin, because presumed that *Declarator of bastardy.* he has none. Haddington, 18th January 1612, Clark *contra* Strachan and Drummond. — The like, Hope (*Bastard*) 10th January 1618, Hirpet *contra* Scot. — In a declarator of bastardy, a general citation at the mercat-cross, of all parties having interest, is sufficient, unless particular persons be named who would succeed, if the defunct were not proven bastard, and, in that case, these persons must be cited *cum processu*. Stair, 17th December 1679 Somervell *contra* Stayns.

DECLARATOR of property may be pursued against the feuar of the lands, without calling the superior. *Declarator of property.* Durie, 21st December 1633, L. Weemyfs *contra* Stewart. — In a declarator, That the sheriff of Inverness had a right to fish three days in the water of Ness, no necessity was found to call the town, or any, but the possessors. Fountainhall, 8th November 1677, Earl of Murray *contra* Feuars.

IN an action against a wadsetter of a part of lands that had a moss in common, for restricting the wadsetter's interest in the said common-ty, the Lords sustained process against the wadsetter, tho' the granter was not called; but they declared, That what should be done in this process should not prejudice him. Durie, Haddington, penult. February 1623, Irvine *contra* Forbes. — In a declarator of property, libelling certain marches and bounds to the lands, which in effect terminated in a perambulation, or fixing of the marches, it was found sufficient to call him who had a disposition to the adjacent lands, tho' he was not infest; and he being called, that it was unnecessary to call the disponent who stood in the real right. Gilmour, 3d Stair, 8th January 1663, Nichol *contra* Hope. — A decret of perambulation, pronounced by the sheriff, was sustained against Feuars, tho' the superior was not called, the Lords declaring, That if the lands should fall in the *Of marches,*
superior's

superior's hand by recognition, non-entry or otherwise, the decreet could not prejudice him. Stair, 8th February 1662, Lord Torphichen *contra* . Gilmour, February 1662, Ld. Livingston *contra* Feuars.

Of servitude. TENANTS being conveyened for certain servitudes, alledged due out of the lands they laboured, this dilator, That their master was not summoned (without which no servitude could be constitute upon the lands) was sustained, tho' not proponed for the defenders, but by their master compearing, uncalled, for his interest. Durie, Spotiswood, (*Summons*) 9th February 1628, Ld. Wardis *contra* tenants of the Ld. of Duncintie.

Declarator of redemption. FOUND, that a person to whom a reversion is given, needs not warn the present possessor, but only him who granted the reversion, or his heirs. Colvil, January 1586, Hog *contra* Ld. Waughton. Haddington, 22d November 1610, Lord Sanquhar *contra* Ld. Clunnie. ---- There is no necessity to make premonition to any, except the heritable possessor; but in the summons of declarator upon the order, not only the present heritable possessor, but also the apparent heir of the first granter of the reversion must be summoned; and altho' the lands annualized have past through never so many hands, yet the redeemer need not summon any but these two. Durie, Spotiswood (*Redemption*) 9th July 1630, Fisher *contra* Brown. ---- This exception against an order of redemption was admitted, viz. That the person from whom the lands were craved to be redeemed, was but liferenter by reservation, and his son, the fiar, was not called. Sinclair, 23d May 1542, Ramsay *contra* Damperston. ---- A person having comprised lands from a wadsetter, and charged the reverser to receive him as vassal, and the charge being suspended, and litiscontestation made in that process, long before the order of redemption, so that the reverser needed not mistake him; yet the Lords found no necessity to wain this compriser, but only the wadsetter's heir. Spotiswood, (*Redemption*) 20th March 1629 Earl of Buccleugh *contra* Young. ---- In a declarator of redemption, the Lords found, that it was not sufficient to call the heir of tailzie of him who granted the reversion, altho' he was infest and in possession, but that the heirs of line, as necessary persons, ought also to be summoned. Durie, 18th March 1628, Lord Cathcart *contra* Ld. Carfe.

Declarator of escheat. IN a declarator of a dead man's escheat, not only the wife and children must be called, but the heir, because of his heirship goods. Haddington, 8th June 1610, Muschet *contra* Muschet. ult. May 1610, Gibson *contra* Libberton. ---- He who seeks declarator of the escheat of a defunct, should summon the heir, and haill children of the defunct, and if he omit any of them, he will get no process unless the defunct had executors confirmed; in which case, it was found sufficient to summon the heir and executors. Haddington, 15th January 1611, Veitch *contra* Brunton. ---- Found, That in a general declarator of a defunct's escheat, all the nearest of kin, of the same degree, who had interest in the executry, ought to be called, and that it was not enough to call the relict who had right, in law, to the half, there being no children, because some of the nearest of kin might produce

produce a discharge of the debt, the ground of the horning, which would exclude the escheat as to any part of the goods; but the Lords allowed them to be cited *cum processu*. Marcus, (*Escheat*) December 1682, Lord Aberdeen *contra* Anna Pitcairn. — In a special declarator, the Lords found, That there was no necessity to summon the children of the defunct rebel, because a general declarator was obtained against the defunct himself. Haddington, Hope, (*Declarator*) 2d February 1611, Frazer *contra* M'Finzean. 12th November 1612, Balfour *contra* Futhie. Durie, 21st November 1626, Seton of Meldrum supplicant. — The heirs and executors of a defunct rebel must be called to a special declarator; but if they concur without citation, it will be sufficient. Haddington, 7th December 1609, Johnston *contra* Napier. — A donatar having obtained general declarator, thereafter calling a debtor to the rebel, to make arrested goods forthcoming, needs not summon the rebel, because the preceeding declarator has transfer'd the rebel's whole right in the person of the donatar. Haddington 13th January 1610, L. Preston *contra* Hamilton. — The donatar to a rebel's liferent having obtained general declarator, the Lords found, That he may warn tenants to remove without necessity of calling the rebel. Haddington, February 1603, Watson *contra* tenants. — In a declarator of escheat, it was objected, That all parties, having interest, were not cited at the mercat-cross, conform to the warrant of the letters, which was repelled, in respect that this was but *stylus curiæ*, long in desuetude; it being enough that the rebel is cited, and none can be prejudged who are not cited, and any that pleases may appear for his interest. Stair, 27th June 1666, Mason *contra*.

A DECRET of declarator of non-entry was found null, because it being libelled, that it fell by the death of the last fiar, his heir of line was not called. Fountainhall, 15th December 1686, and 12th January 1687, Duke of Hamilton *contra* Countess of Callendar. — In a declarator of non-entry, the Lords found, That the superior needed call none but his own immediate vassal, and having obtained decret against him, that he might thereafter get his sub-vassal removed, altho' he had received the feu-duty from him, and had not called him in the declarator of non-entry. Haddington, (*Non-entry*) 9th June 1610, Wedderburn *contra* Hopper. — In a declarator of non-entry, it was alledged for the defender, That the pursuer must condescend how long the lands have been in non-entry, and by whose death, and must cite the apparent heir of the defunct *in initio litis*, as the proper contradictor, the defender being a singular successor. Answered, The pursuer being a singular successor to the superiority, he cannot know who were the vassals that died last vest and sealed, which the defender may know by the writs; and if he will condescend upon the apparent heirs of the vassal last infest, the pursuer will call them *cum processu*, and any superior may claim the retour-duties for 30 Years back, unless the vassals can instruct how long the lands were full. The Lords sustained the process, unless the the defender would condescend who represented the persons last infest, to the effect the pursuer might cite them *cum processu*. Marcus, (*Non-entry*) February 1683, Marquiss of Queensbury *contra* Earl of Annandale. Declarator of non-entry.

Of recogni-
tion.

THE Lords found it not necessary in a process of recognition to call the parties in whose favours the alienation was made, altho' *vel maxime res eorum agebatur*. Colvil, March 1584, king's advocate *contra* M' Culloch.

Regrets up-
on excambed
lands.

IN a declarator for regrets to excambed lands, because of eviction of the lands given in excambion, it is only necessary to cite the party, or his heirs, with whom the excambion was made, and the present heritable proprietor of the excambed lands, but no need of citing his intermediate authors. Durie, 2d July 1629, L. of Wardis *contra* Balcomy.

In simple
reductions of
voluntary
rights.

IN a reduction of a tack, set by a kirkman, without consent of the patron, which tack was assigned to a third party, the Lords found no process, because only the assignee, and not the cedent was called. Spotswood (*Assignation*) Durie, 20th March 1630, Murray *contra* M' Kenzie. --- In a reduction of a vassal's infestment of his lands, there is no necessity to summon the vassal's superior. Hope, (*Reduction*) 26th July 1615, Douglass *contra* Ld. Waughton. --- In reduction of a bond granted in minority, if the assignation be intimated, the assignee must be cited *intra annos utiles*, and not the cedent. Stair, 2d July 1667, Lord Blantyre *contra* Wakinshaw. --- In a reduction of alienation of lands at a man's instance, which with consent of curators he had made when minor, the curators need not be called, tho' they gave their own warrandice against reduction. Durie, 7th March 1637, Vernock *contra* Hamilton.

In reduci-
ons of judicial
deeds.

A DECREE being obtained against a minor as heir served to his father, the minor obtained afterwards reduction of his retour, and thereupon intended reduction of the decree; it was objected, That the reduction of the retour could be no foundation to reduce the decree, because the obtainer of the decree was not cited therein. It was answered, That in reduction of retours none needs be called but the judge, clerk, and inquest. *2do*, The decree was obtained against the minor when he was but twelve years of age, and never charged upon; so that when the reduction of the retour was intended, the minor neither knew, nor was obliged to know of any decree against him. The objection was repelled. Stair, 24th July 1661, Mitchels *contra* Hutchison. --- In a reduction of a decree of exoneration, it was alledged by the executor, That all parties having interest were not called, *viz.* The creditors and legatars, who were concerned in the event of the reduction, for if their sums and discharges were not allowed, according to the exoneration, the defender behoved to return upon them for payment; the Lords found no necessity to call the creditors and legatars, but that the defender might intimate the plea to them. Stair, Newbyth, 11th January 1665, Arnot *contra* Arnot.

In reductions
and improba-
tions.

THE Lords sustained process in a reduction and improbation of a real right, without finding any necessity for the pursuer to call the defender's author, in respect the said author was not liable to the defender in any Warrandice, no not from fact and deed, and so had no manner of interest in the cause. Forbes, 18th December 1708, Erskine *contra* Hamilton. The like, Stair, Gosford, 14th July 1671, Dunbar *contra* Maxwell. --- It being alledged by the defender in an improbati-

on, That no certification could pass against writs granted to his authors, unless the authors immediate and mediate were called. Answered for the pursuer, It is enough to call the immediate, who may intimate to the mediate authors as they find themselves concerned. Reply'd; The mediate authors ought also to be called, because they are liable in warrandice. The Lords found, That all authors should be called by the pursuer, as they are condescended on by the defender, who is to give his oath of calumny, that the persons in the condescendence are authors, and liable in warrandice; and if the pursuer will not be at the pains to cite old authors, he may pass from the rights made to or by them, and restrict the libel. *Harcus, (Improbation)* November 1684, Lord Advocate *contra* Lord Cardross and Ld. Livingston. Here was a condescendence of near twenty mediate authors, and this decision seems to render improbations tedious and chargeable to the pursuers.--- In an improbation the evidents made to the defender's authors being called for; found, That it was not needful to call the apparent heirs of these authors, unless the defender would specially condescend who the apparent heirs were. *Durie, ult.* January 1627, Ld. of Lauriston *contra* tenants.--- An apparent heir being called in a reduction and improbation of a right to lands granted to one of his predecessors; this dilator propon'd by him was sustained, *viz.* That he was denuded of the lands in favours of another, who now stands infest, and who is not called, altho' the right by the apparent heir to that person was upon a singular title, and had no dependence upon the right sought to be improven. *Durie*, 15th March 1627, Earl of Kinghorn *contra* Ld. Grange.--- Found that sub-vassals, being in possession, ought to be called in an improbation against the vassal their author, because they could not be unknown being heretable possessors; but as to tenants bruiking lands by tacks, or heritors bruiking by sub-tacks their own tiends, their Lordships thought, that it could not so well be known that they had right, and so were not parties necessary to be called. *Durleton*, 23d January 1668; town of Glasgow *contra* .--- The clerk register found to be a necessary party to be summoned, where the king's writs in his keeping are called for to be reduced. *Haddington*, 26th November 1622; Earl of Mar *contra* Lord Elphinston.--- In an improbation of a comprising; the clerk thereto was not found needful to be summoned, altho' the warrants thereof were called for, seeing he was not a publick person, but chosen at the pleasure of the compriser, who chooses his clerk upon his own hazard. *Durie*, 28th June 1628, *Henderfon contra* Lady Knockhill.--- In an improbation the Lords found that services cannot be reduced for not-production, where only the party is called in the process, and neither the director of the chancery, who is presumed to have the service, and to keep the same for the warrant of the retour, nor the judge and clerk before whom the service was deduced, is called. *Durie*, 17th February 1624; Lord Elphinston *contra* Earl of Mar.--- Certification was refused in an improbation at the instance of a superior against vassals, of writs granted to their predecessors, until the predecessor's heir of line was called, altho' the heir male was called, and had acquired the heir of line's right; but it would have been granted, if the pursuit had been restricted to such writs as were conceived in favours of the predecessor and his heirs male. *Durie*, 11th January 1628, Earl of Mar *contra* his vassals.

Mails and
duties, and re-
moving.

A DEFENDER in a removing having founded upon a tack from a rentaller who was not warned, and the pursuer having reply'd upon conditions in the rental, by which it would appear to be expired; the Lords found no process till the rentaller was called. Durie, 22d March 1627, Lady Nithsdale *contra* her tenants. --- But where the rental bore an express prohibition to assign or sublet, it was not found necessary to call the rentaller. Durie, 15th July 1628, Lady Maxwell *contra* tenants. --- The donatar to a ward calling the tenants to make payment to him of their duties of fairs lands, needs not call their master; for as a ward needs no declarator, so, when the donatar calls for the mails, he needs to know none but the actual possessors of the lands. Haddington, 22d February 1612, Skeen *contra* tenants. --- To found an action of mails and duties against tenants, it is not necessary to call the master; in removings indeed the heritor should be called, because thereby his possession is to be inverted; but in mails and duties the tenants may suspend on double poinding, or if a tenant collude with the pursuer, the master may use the tenant's name to suspend; but double poinding can have no place in removings. Durie, 25th February 1630, *contra* Durie, 13th November 1634, Mudie *contra* Lighton. Stair, 10th June 1665, Home *contra* . --- The like, Fountainhall, 28th January 1702, Haliburton *contra* tenants of Carse. --- An exception sustain'd in a removing, that the defenders were tenants to a third party infest in the lands, who was not warned, and they were found not obliged to say or instruct that he was lawfully infest, because the master only could be obliged to dispute upon the lawfulness of his right. Durie, 7th December 1627, Lord Bamf *contra* his tenants. --- The master of tenants need not be called in a removing, where there is a special infestment, to which the author of the master has consented. Haddington, 11th January 1610, L. of Smeton Hepburn *contra* Hepburn. --- In a removing at the instance of a lady tencer kenn'd, there was found no necessity to call a compriser from her defunct husband, tho' infest, and in possession of the rents. Durie, 18th March 1630, Lady Maxwell *contra* tenants. --- Far less the heir of her husband, seeing one is not bound to cite his own author. Spotswood, (*Removing*) 26th July 1627, Lady Boyn *contra* tenants. --- In a removing there was found no process, all parties having interest not being called, viz. the defender's wife, in respect he possess'd but by his *jus mariti* in her right. Stair, 15th July 1665, Johnston *contra* Brown. --- In a process for removing it was sustain'd as absolvitor to the tenants, that the liferenter, whose tenants they were, had not been warned or called, she being alive at the time of the warning, tho' dying before the term. Stair, 30th June 1669, Agnew *contra* tenants of Dronlaw. --- In a removing it was not sustained as a defence, That the defenders were tenants to another, and he not called, unless they could condescend upon their master's right, which might defend him and them. Stair, 9th December 1664, Inglis *contra* Hog. --- The Lords found, That a first compriser, in possession of the rents, having charged the superior, but not infest, needs not be called in a removing at the instance of a second compriser infest. Gilmour, 15th December 1664, Inglis *contra* Kelly.

Abstracted
malures.

A MAN pursuing possessors of lands, for abstracting their corns from the pursuer's miln, albeit he called not the heritor, because the tenants are

are called *super facto proprio*, he will get decret, but that decret given against the tenant, will not prejudice the master of his defence or right. Haddington, 1st December 1610, Fenton *contra* tenants of Mathartie. --- No process was found against any tenants for abstracted multures; where their master, the heritor, was not summon'd, altho' it was alledged, That they were in continual use of bringing their corns to the pursuer's miln, as thirled thereto, and paying the accustomed dues of thirlage, past memory of man. Spotiswood, (*Multures*) Hope, 20th March 1628.

In a process at an assigney's instance for payment, it was found relevant for a prior arrester to appear in the process, and plead his preference, without calling the common debtor. Stair, 5th June 1666, Nisbet *contra* . --- An arrester pursuing furthcoming, and referring the verity of the debt arrested to the oath of the party, in whose hands the arrestment is laid, and summoning him to a day to depone, must also summon the original debtor to the same day; or if that is neglected, the oath may be taken to ly *in retentis*, but no decret can go out till the principal debtor be summon'd, and the days of the summons run. Durie, 17th March 1637, Stewart *contra* Stewart. --- In an action to make furthcoming a moveable sum; pursued after the common debtor's decease, it was found, That the heir is not *legitimus contradictor*, to be called as defender; but that the executor ought to be called. Fountainhall, 20th January 1681, Maxwell *contra* Riddel.

A COMPRISING was sustain'd, altho' the wife was not called there-to, seeing there was no right comprised from her, but only what right her husband had thereto, *jure mariti*. Durie, 15th June 1624, Finlayson's wife *contra* Wood. --- In an adjudication against a vassal the superior need not be called. Fountainhall, 16th July 1678, Courty *contra* Stevenfon.

In a reduction *ex capite inhibitionis*, there was found no process till the person inhibited were called, the defender's author, and who was bound to him in warrandice. Stair, Newbyth, 31st January 1665, Lord Borthwick *contra* Ker. The like, Hope (*Inhibition*) 10th July 1617, Brown *contra* Wright.

FOUND, That in a pointing of the ground, it was sufficient to call the defender, being infest, altho' under reversion, and that there was no necessity to conven any other heritor, because thus it would be as reasonable to call the heritor's author; nor had the pursuer any necessity to know of the reversion, because it might be discharged, &c. But that other person compearing, was allowed to do so for his inrerest. Durie, 1st February 1631, Cunningham *contra* Williamson. --- Yet in a pointing of the ground, no process was found till the party was called, who at the time of the summons stood heritably infest in the lands; altho' the pursuer replied, That there was no necessity to summon him, seeing his heritable infestment was but a base one, granted to be holden of the giver. Durie, 19th January 1636, Oliphant *contra* tenants. --- The heritor must be called, not the superior. Durie, 19th January 1636, Oliphant *contra* tenants. --- A compriser not infest

infest, need not be called. Haddington, 19th December 1609, Spotiswood *contra* L. Westfortune.

Process of
sale.

IN a process of sale, at the instance of a creditor of his debtor's estate, upon the head of bankruptcy, the Lords found no process, in respect there was no edictal citation, nor any warrant in the summons for such citation, as the act of sederunt, 23d November 1711, directs. Here it was pled, what the act of sederunt enjoins is not of necessity, but of expediency, which the raiser of the sale may prosecute, or not, as he thinks fit; and that if all the real and personal creditors be cited personally, or at their dwelling-houses, in the common course of diligence, the edictal citation is superfluous. 28th June, 1727, Earl Marchmont *contra* Earl Home.

Exhibition.

IN an action of exhibition and delivery of the court books of a sheriffdom, at the instance of the sheriff, it was found not necessary to call the heir or executors of the sheriff clerk, but only the havers; because these books are publick, and pertain to the judge, and not to the defunct's representatives. Haddington, 26th November 1611. Ld. Sanquhar *contra* Padzian. — In an exhibition of some heritable writs, at the instance of an heir against his father's relict, and some other persons as havers, the Lords found, That the debtors needed not be summoned, seeing there was no execution craved against them. Durie, 6th December 1623, Fotheringham *contra* Fotheringham's relict. — But the relict of a debtor in a bond, being pursued to exhibit the same, and in that process making voluntary exhibition thereof; the Lords, nevertheless, found no process, till some person were summoned to represent the defunct debtor, seeing it was not libelled, that ever the bond was the pursuer's evident, or ever delivered to him, but produced now, after the debtor's decease by his relict, from among her husband's writs; and this was found being proponed by a creditor. Durie, 17th March 1636, Reid *contra* Gibson. — A compriser cannot seek for production of any writs of the lands comprised, nor the same to be copied to him, without calling the debtor to the pursuit. Durie, 10th March 1627, Dick *contra* Skeldon.

Incidents.

IN case of a party's craving an incident for recovering of writs called for to be improven; the Lords found, That the Lord advocate, as being a necessary party, behoved to be summoned; because he, being a party in the principal summons, could not be left out in the incident. Spotiswood, (*Incident Diligence*) Durie, 10th February 1624, Lord Yester *contra* Earl of Buccleugh. 12th February 1624, Earl of Mar *contra* Lord Kildrummie.

Process of
transumpt.

A TACK of tiends being set to a man, and to three of his heirs *successive*, and then for 19 Years after, and the commission having thereafter granted him a decreet of prorogation for 202 years after the expiration of his tack; and the tacksmen's representatives pursuing an heir for his tiends, but producing only the decreet of prorogation of the tack, and a transumpt of the said tack, to which the defender's authors were not called; the Lords found the decreet of prorogation and transumpt not sufficient, unless the tack had been expired, and the years

years of prorogation commenced, tho' these would be good adminicles, if the tenor of the tack were to be proven. Fountainhall, 13th December 1699, baillie Talfer *contra* Sir Thomas Dalziel.----A transumpt was found not to instruct a pursuer's title, when the process of transumpt was raised *pendente lite principali*, and the defender not called thereto. Maitland, 20th July 1552, tutor of Pitcur *contra* Lord Gray.----The contrary found in the case of a *fasine*, in which case there is no party directly or immediately concerned to be called. Durie, 15th February 1623, Hope-Pringle *contra* Earl of Home. Durie, 17th June 1630, Earl of Wigton *contra* Earl of Cassils.----In transumping of charters or *fasines* of lands, it is necessary to call the superiors of said lands, albeit the like custom have not been in transumping of charters and *fasines* of lands holden of the king in time past, yet the like reasoning militates for his majesty's interest, and the Lords will proceed so in time coming. Haddington, 19th June 1612, Lady Dunwedie *contra* Johnston's relief.

ACTION of proving the tenor cannot proceed against the heir of a defunct without calling the executors. Durie, 5th March 1628, Hammermen of Glasgow *contra* Crawford. Proving the tenor.

CITATION cum processu. See Quod ab initio vitiosum.

AS to places where citations must be used, and the formalities thereof. See Execution.

CLANDESTINE MARRIAGE.

A LANDED Gentleman being pursued by the procurator of the jurisdiction where he lived, for the fine of his clandestine marriage, upon the act of parliament 1661; the Lords, in an advocacy of the cause, found, That the judge and his fiscal had no right to this fine, it being a clandestine marriage within the kingdom, in which case the act appoints the fine entirely to belong to the poor of the parish; yet considering, that if there were no reward, there would be no pursuer, they found, That the fiscal ought to have all his expences out of the first and readiest of the fine; but had no respect to a defence founded on payment already made to the minister of the parish, nor to his discharge produced, and found the defender liable in the fine. Fountainhall, 7th December 1705, procurator fiscal of Annandale *contra* Carruthers.

A WIDOW pursuing for her terce, and the act of parliament 1672, against clandestine marriages being objected to her, whereby the woman is to lose her terce; the Lords, upon perusal of the act rescissory in 1690, did find, That the aforesaid act 1672 was thereby totally rescinded, and so repelled the objection, tho' it appears that no more was intended, but only the abolishing of the act, in so far as it was inconsistent with presbyterian government, and the present establishment,

which that clause of losing the *jus relictæ* was not. Fountainhall, 11th December 1705, Carruthers *contra* Johnston.

CLAUSE, &c.

*Communi
pastura.*

FOUND that the clause *cum communi pastura*, implies no more than liberty to pasture on his own property, but not on any neighbouring common, unless the clause were *in verbis dispositivis*, the said clause being only insert for form's sake, and generally to be found in all charters. Colvil, February 1585, Dundas *contra* Elphinston.

*Moris, mare-
fuis.*

THE two halves of a barony being disposed at different times, to two different persons, in a mutual declarator touching a moss belonging to the barony, the Lords found that the moss belonged to the last disponee, seeing the first disposition bore only *cum moris & marefuis* in the tenenda's, but did not mention it in the dispositive clause. Dirleton, 25th January 1668, Keith *contra* Graham.

*Cum piscati-
onibus.*

IN a question whether the clause *cum piscationibus* did include the gathering of sea wreck, as *minus sub majore*, as pasturage includes casting seal and divot, &c. the Lords found that these were quite distinct, and that sea wreck came not under the clause *cum piscationibus*. Fountainhall, 15th December 1699, Ld. of Fullarton *contra* Baillie.

*Species of
money.*

A CLAUSE in the *reddendo* of a charter, *Solvendo quatuor solidos & quatuor denarios monetæ stirilingorum*, was found to import only Scots money. Newbyth, 26th June 1666, Ld. Wedderburn *contra* King.

Free rent.

A WIFE being provided to a certain yearly sum of free rent, it was found that this must be over and above the tiend and feu-duty; but that it did not free her from the cess and maintenance. Stair, 22d, Gosford, 24th February 1670, Countess of Cassils *contra* Earl of Cassils. — The Lords found a difference betwixt an obligation, *to free only life-rented lands from all burdens imposed, or to be imposed, and to make them worth so many chalders of rent*, that the first of these clauses did extend indeed to the burden of the militia impos'd by authority, but could not extend to the reparation of a mill dam, the heritor offering to get a sufficient tenant for paying of the ordinary duty yearly. Gosford, 23d February 1669, Lady Tarfapp *contra* Ld. Kinfauns.

*Valid and
sufficient in-
feftment.*

A PARTY being bound to obtain himself validly and sufficiently in-
feft; the Lords found that this did import a publick infeftment. Home,
March 1682, Buchan *contra* Jamieson. — The like, Foun-
tainhall, 18th July 1678, *inter eosdem*.

*Debts real
and true.*

A PARTY having granted a disposition to his nephew without an
onerous cause, not only burdened with all debts already contracted, but
with a faculty to burden farther during his life with debts *real and true*;
the

the Lords found, that this clause must import more than the debts not to be *false*, that it must import also, That the debts to be contracted should be no meer gratifications to evacuate the disposition, but must be so far onerous, as to be rational deeds of administration. Fountainhall, 16th December 1697, Sands *contra* Sands.

AN infestment of four acres of land found to be demonstrative, and not taxative, and therefore was sustained against a process of removing, the pursuer craving the possessor to be removed from all that was above four acres. Durie, 2d February 1630, Douglass *contra* Lyne.----
 If to an infestment of lands under a general denomination, be added a more particular description, by expressing the names of the particular tenants, possessing some of the lands only, this will be reckoned taxative to limit the infestment to the lands possessed by the particular tenants enumerated, tho' the rent of the parts be not sufficient to pay the sum for the security of which the infestment was granted. Durie, 1st February 1634, Murray *contra* Oliphant's wife. --- Found that a minister's presentation to vicarage tiends, as possessed by his predecessor, was not taxative but demonstrative, there being no taxative word of *allegedly*, or the like subjoined. Marcus, (*Ministers*) March 1683;
 Mr. Thomas Robertson *contra* the Ld. of Carnal. --- A party being bound to pay an annuity out of the first and readiest of the rents of an estate; the Lords found, That, because of the said clause, he ought to pay the annuity entire, notwithstanding his alledgance, That he was not obliged simply, but out of the rents, and that these rents, because of burdens, &c. would not extend to satisfy the same. Dirleton, 17th July 1667, Ld. Hermistoun *contra* Lord Sinclair. --- A tack being set, bearing *certain lands, containing forty eight measured acres, with pasturage and pertinents, every acre to pay six shillings*; the setter insisted in a declarator, that there were sixty acres, and that the tacksmen should pay accordingly, which was repelled, in respect the extent of the acres here was not taxative, but designative. Stair, 31st January 1679, Rothead *contra* Borthwick. --- A legacy being left in these terms, *viz.* That it should be paid out of the testatrix her household plenishing, and debts due upon accounts, the Lords found, That altho' the said plenishing and debts should not be able to satisfy the legacy, it was not a limited legacy, but ought to be satisfied out of the other executry, and that the said words were only *executiva*, as to the order and way of payment, in the first place; and *interpretatio* should be *ut actus valeat*, especially seeing the legatary was the defunct's relation: But here the Lords were convinced, that the executor had given up inventory far short of what the moveables did really extend to. Dirleton, 11th July 1676, Finlay *contra* Little, --- A legacy of 1000 *L.* payable out of a certain subject, which was found to be heritable, was sustained, notwithstanding against the executor; this being understood demonstrative only, not taxative. Durie, Spotiswood, (*Legacy*) 22d January 1624, Drummond *contra* Drummond. --- A legacy of 1000 merks, out of the rests due by the tenants, was found payable out of the rests only, and not otherwise performable, if there was not so much of rests. Stair, 21st January 1673, Forbes *contra* Forbes.

A BURGH by its charter, having granted to it indefinitely the escape of cheats of all delinquents convicted; the Lords found, that this cannot be extended

extended to the escheats of such as are declared fugitive, and put to the horn for not compearance in a criminal cause, but that such escheats do belong to the king and his donatar. Sinclair, 25th May 1542, Ormiston *contra* town of Edinburgh.

Clause importing a regality.

ERECTION of lands into an earldom, with as ample powers as were competent to any other Earl in Scotland, was found not to give that Earl a right of regality, nor to his heretable baillie of the earldom a right to be heritable baillie of regality. Forbes, 9th July 1713, Duke of Montrose *contra* M^r Aulay of Ardincaple.

Between and a term.

IN the stile of law, these words, *Betwixt and a certain term*, do not exclude the day of the term. Dirleton, 26th January 1675, joint petition of the advocates.

Naming a person in office.

A BOND being granted by the donatar to an escheat, "That he being satisfied of what was resting to himself, should apply the rest at sight and declaration of the Lord treasurer;" the Lords found, That the declaration was to be understood, not of him who was treasurer when the bond was granted, but of him who is treasurer the time when any alledgance shall be made upon the said bond. Auchinleck, 10th July 1632, Bowmaker *contra* Home.

Grant during pleasure.

IN a removing at the instance of an heir of a donatar to a ward against a tenant, this exception, That the tenant had a tack from the defunct, which was to stand during the said granter's pleasure, was not interpreted to stand during the ward, but that *voluntas morte extinguatur*. Colvil, January 1583, heiress and representatives of Earl of Murray *contra* tutor of Sanquhar.

Clauses in contracts of marriage.

A WOMAN in her contract of marriage obliging herself to pay to her husband 2000 merks of tocher, *at least to subscribe and deliver assignations to as many sufficient bonds as would extend to that sum*; this clause was found to import, That the sum must be paid by bond or assignation as aforesaid; and that the moveable goods and gear which fell otherwise to the husband *jure mariti*, could not be imputed in payment thereof. 1st January 1730, Kennedies *contra* Ronald.—A husband who stood obliged by his contract of marriage, sufficiently to secure his wife in a jointure, amounting to 1000 merks a year, having purchased some tenements and houses in Edinburgh, and provided the same to her in liferent; the Lords found, that was not a sufficient equivalent provision to answer the obligation in the contract, because of the accidents of fire, and the considerable reparations that houses are subject to, and therefore, decerned against the husband's heir to fulfil the obligation in the wife's contract of marriage, and ordain'd her to renounce any right to the tenements. Here there was a clause in the contract, That the fund for the wife's jointure should be employed with her father's consent, which was not done. Marcus, (*Contracts of Marriage*) March 1685, Janet Lindsay *contra* John Lothian.—A man being obliged in his contract of marriage, to employ 20000 merks, upon well-holden lands, to his wife in liferent, and the heirs of the marriage in fee, and execution to pass at her father's instance, who being debtor to the husband in as much as, with the

to-

tocher, made 20000 merks, gave infestment out of his own ward-lands for the same, in the the terms of the contract ; the wife, after her husband's decease, pursued his heir for implement of the contract, in respect her father's lands held ward, and were in danger of recognition, and her husband could not collude with him to her prejudice. Answered, She being infest before the marriage by her own father, who might have stopped the marriage, and at whose instance execution was ordained to pass, it must be supposed, That all parties agreed to the implementing of the contract by a security out of the father's lands. The Lords, in this circumstantiat case, found the infestment, out of the ward-lands, sufficient, unless recognition be incurred. Marcus, (*Contracts of Marriage*) November 1685, Lady Kirkland and her spouse *contra* her son.

A PARTY who had no children, save daughters, having tailzied his estate, failing heirs male of his own body, to his three uncles *successive*; but thereafter, by a declaration and obligation, having revoked the said tailzie, with this narrative, That the eldest uncle had offended him, and therefore declaring the tailzie null, and obliging himself, so soon as he returned to his own house, to destroy and take his name from the said bond of tailzie ; and, after this, having lived six years without destroying either the said tailzie or the said revocation thereof ; in a pursuit at the instance of the second uncle, who was the next branch of the tailzie, against the defunct's daughters, who were heirs of line ; this question being at full length debated, *viz.* Whether, by the revocation, the tailzie was annulled *in totum*, or only as to the first branch, and subsisted *quoad* the rest ? It was found, that it imported a total revocation. Fountainhall, 9th December 1701, Burnet *contra* Burnets. Revocation of a tailzie.

CLAUSE dubious, interpreted against the writer. Stair, 20th December 1665, M'Laud *contra* Young and others. Clause dubious.

ONE having disposed his estate to his eldest son, burdened with all his debts, contracted or to be contracted, *pro expediendo licitas suas res & necessaria negotia*, the Lords found the son liable for a sum borrowed by the father after the date of the disposition and infestment upon it, without burdening the creditor to prove that the money was truly applied *in rem versum* of the father. Fountainhall, 7th January 1703, Stuart *contra* Barclay. Liberty to contract debt *pro expediendo licitas suas res.*

THE commonty of Biggar, lying within the barony of Biggar, did once belong in property to the family of Wigtoun, and in all probability had been posselt in common by the tenants of the family surrounding the same : The Possessions lying about the common were feued out at several times, and the vassals continued their possession of the common in the same way that the tenant's of the family had done before : The Earl of Wigtoun insisting in a division of the common, claimed the *præcipuum* as proprietor. The defenders insisted, That they were conjunct proprietars ; and the Lords found, That a disposition with *parts and pertinents*, joyn'd with an uninterrupted possession of the muir, as extensive in all respects as the pursuer's possession thereof, doth constitute a right of property ; but where a disposition was in these Clauses, whether importing property or only servitude.

these terms, *with liberty and privilege of the commony of Biggar*, they found it only to import a right of servitude. They further found, That this clause, *With parts and pertinents, and common pasturage used and wont*, doth only import a right of servitude, unless the feuar condescend upon some special right of common pasturage belonging to his lands, other than that upon the said commony, to which the general words of *common pasturage* may apply. 23d January 1739, Earl of Wigtoun *contra* feuars.

COALIER.

FOUND, That the act 11th, Parl. 1606 anent coal-hewers, relates only to going coal-pits, and that therefore it was lawful for parties to fee, hire, and conduce coal-hewers, where coals are given up, or not able to maintain the men. Hope (*Coal-beughs*) 7th March 1616, Lord Lothian *contra* Bothwel.

In a requisition of coaliers, upon act 11th, Parl. 1606, and act 56, Parl. 1661, the Lords found, That coaliers cannot be hired without a testimonial from their former master, and this tho' that master had wanted a coal for several years, so that his coaliers, without his consent, had gone into the service of another; yet they found, that he might very well require them to his own service again after he had got a going-coal of his own, tho' they were several years away from him, seeing they had not been year and day in the defender's work. Fountainhall, 4th February 1708, Wallace *contra* Cunningham.

COLLATION.

Has no place
save in succeffion
of moveables.

THERE is no collation in our law, but in the case of succeffion in moveables, and therefore, not amongst heirs portioners, whatever separate provisions any of them may have got by contract of marriage, or otherwise. Stair, Gosford, 20th December 1673, Jack *contra* Jack. Fountainhall, 19th February 1695, Sinclair *contra* Sinclair.

Nor where
the succeffion
to moveables
is in virtue of
a destination.

LANDS being provided in a contract of marriage, by the first clause to the heir, and the conquest to the children by a subsequent clause, the Lords found, That the heir had a share in the conquest (tho' it was most part executry) without collation, because he was also a child. Fountainhall, 21st July 1680, Brown *contra* his mother and tutors.

Nor with
regard to any
subject save
moveables.

A SECOND son insisting for his legitim, was not obliged to collate a provision of land, which he got from his father; for collation is introduced to keep equality amongst the children, only as to the moveables, and

and since the moveables suffer no diminution, by giving a provision of land to the second son, there could be no reason for the collation. Stair, 14th February 1677, Duke of Buccleugh *contra* Earl of Tweeddale. — For the same reason, in drawing a share of the moveables, an heir-portioner is not bound to collate with her sisters an estate disposed to her by her father. Home, 19th November 1720, Riccart *contra* Riccart.

COLLATION takes no place where it is prohibited, as for example, where a father in his daughter's contract of marriage, besides her tocher, made this provision, *That she should have an equal proportion of his goods, at his death, with his other children.* Durie, 19th February 1631, Corfan *contra* Corfan. — Or where it was provided, that in her contract of marriage, "That she should be a child in the house at the time of his decease." 18th November 1737, Beg *contra* Lepraick.

COLLATION takes place only amongst brothers and sisters, and not when they compete with the relict. Durie, Spotiswood, (*Forisfamiliation*) 27th February 1627, Ross *contra* Kellie. — An only child being *forisfamiliat* by marriage, and having got a tocher, but not bearing *In satisfaction of childrens part*, was found, notwithstanding, obliged to collate that tocher with the relict, before she could have access to draw her third share of the defunct's moveables. Stair, 18th February 1663, Dunbar *contra* Lady Frazer. — The contrary found, 11th December 1719, Lady Balmain *contra* Lady Glenfarquhar. — There being only one child, who was both heir and executor, he was found to have the whole childrens part, without collating the heritage with the relict. Stair, Fountainhall, 12th January 1681, Trotter *contra* Rothead.

THE heir can have no part of the moveables, (excepting heirship) unless he be willing to collate. Balfour, (*Heir*) 19th April 1554, Law *contra* Law. Maitland observes it 14th July 1553, and 24th April 1554. — The heir collating his heritage, has a title to a share of the childrens part. Stair, 16th July 1678, Murray *contra* Murrays. — But is obliged to collate whatever is derived to him from his father, whether by disposition or representation. Stair, 23d July 1678, *inter eosdem*.

COLLEGE.

THE whole administration of a college, being by the first institution, lodged in the *præpositus*, a *licentiatus*, and a *bachelarius* of divinity, which two last were suppressed at the reformation, and four professors of philosophy put in their stead; in a comparative trial for one of the regent's places, two of the three regents having voted for one of the competitors, and the third a *non liquet*, yet the *præpositus*

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by himself installed the other, alledging, That the regents were but his assessors, and had no share of administration : But the Lords found the contrary, and annulled the nomination, and preferred the other. Fountainhall, Forbes, 22d July 1707, Halden *contra* Rymer and Ramsay. ----- A college having been erected by the king, and confirmed by the pope, naming those who were to be masters ; but there having been lately two other masters added by the sovereign, for professing other sciences there, and in a comparative trial for the regency, the principal having refused these two their votes, as not being on the first foundation ; The Lords found the principal in the wrong, and that they had good right to vote. Fountainhall, 21st December 1711, Burnet *contra* Simpson.

Delinquencies in professors, how to be tried.

A PROFESSOR in a college having been absent more than a month, by occasion of a process before the Lords, raised against him by the other masters, and being thereupon deprived by the head of that house summarily, it being contained in their foundation statutes, That absence for above a month, shall, *ipso facto*, debar them, and the bell being refused to be tolled, and access to the common auditory denied him, the Lords upon his summary complaint, seeing the defender had proceeded to sentence and debarment by himself alone, without the judicial presence of the other masters, ordained the pursuer to be repossessed, and the bells and doors to be rung and opened, as was in use before, without prejudice to the defender and the other founded masters (who are judges in such accidental transgressions) in a collegiate manner to convene the pursuer, and proceed according to law. Fountainhall, 19th February 1712, Gordon *contra* Black.

POWER of administration in masters of colleges. See Community.

COLLEGE of JUSTICE.

Abstract of the Declarator of the Privileges of the College of Justice.

THE Lords declare the members of the college of justice exempt from payment of the ministers stipends, as also from watching, warding, and all impositions for the same, from payment also of all customs, causey-mails, shore-dues, and other impositions laid on their provisions for their families, and their other goods carried to or from the town, for which a certificate from the party (being a member) that they belong to him, is declared sufficient, the same being renewed once in the half year : Further, the Lords declare them exempt from the civil jurisdiction of the magistrates, and that it is sufficient to propone a declinator without the necessity of an advocacy : But as to the criminal jurisdiction, their Lordships before answer declared, That they would take trial what had been the former practice : Moreover, in case of

of a publick tax, laid on by the government, they ordain, That a special stent be laid upon the town for their quota, and so much more only as may defray the charges of collecting, &c. Wherein no exemption is to be given to the present magistrates stentmasters tenements belonging to the town's common-good, to trades, &c. But this, without prejudice to the town of Edinburgh, to lay on the proportions of these who have been in use to be exempted upon their neighbours, but not upon any member of the college of justice. The Lords declare further, That they will from time to time nominate an advocate and a writer to the signet for each quarter of the town, to meet with the city stentmasters, and to see that the valuation be equally made, and the magistrates are appointed to intimate the time of their meeting to the Lord President, Dean of faculty, and keeper of the signet, ten days before, in time of session, and twenty in vacation time. Lastly, they declare the persons following to be members of the college of justice, viz. The Lords, Advocates, clerks of session and of the bills, writers to the signet, the outer-house clerk, and one substitute for registrations in each of the three chambers, the three deputies of the clerks to the bills, the clerks of exchequer, the directors of the chancery, their deputies and two clerks thereof, the writer to the privy-seal and his depute, the clerks to the register general of fines and hornings, the macers to the session, the keeper of the minute-book, and the keeper of the rolls of the inner and outer-houses. All which privileges their Lordships do extend to one servant for each Lord, one for each advocate, four extracters in each of the three clerks offices, two servants that keep the publick register, the keepers of the session-house and advocates library, who are all to forfeit their privilege if they keep any shop, tavern, &c. Sir Patrick Home, February 1687, College of justice *contra* town of Edinburgh.

THE director of the chancery is a member of the college of justice, Director of Stair, 22d January 1669, Collector general of the taxation *contra* the director of the chancery a member.

THE exemption of the members of the college of justice from all civil courts, save the court of session, was found to extend even to causes merely spiritual, ecclesiastick and consistorial. Colvil, December 1582, Earl Bothwell *contra* Maitland. Exemption from answering to other courts, save the session.

FOUND that the relict of a Lord of session enjoys the privileges of her deceased husband during her widowhood. Erskine, 7th June 1593, Ld. Traquair *contra* Lady Newbattle. — The privilege of advocating causes to the Lords from inferior courts, was extended to the relict of a member of the college of justice, she always remaining widow. Haddington, 23d February 1610, Sands *contra* Lady Lothian. Privileges extended to the widows of members.

A LORD of session, either ordinary or extraordinary, has privilege to get his actions called in the inner-house, and may not be compelled to answer in the outer-house. Haddington, 9th March 1610, Melvil *contra* Livingston. Haddington, 27th June 1611, Hamilton *contra* Lord Justice Clerk's tenants. Privileges of a lord of session, not to answer in the outer-house.

Retiring to
the Abbey, if it
is a forfeiture
of privilege.

A PERSON was found not to have forfeited his privilege as a member of the college of justice, by retiring to, and residing in the Abbey, to shun the diligence of his creditors. Forbes, 11th January 1710, *Anstruther contra Gordon*.

Members
must answer
to summar
complaints.

MEMBERS of the college of justice are only obliged to answer summarily upon bill, as to what concerns their offices, or what is acted by them in that quality. Stair, 24th June 1675, *Muir contra Maxwell*. — A petition being presented against an advocate, craving that he might exhibit some papers necessary for the petitioner, a minor, in a process; but the advocate having got them not *qua* advocate, but *tanquam quilibet* from another advocate, the Lords refused to cause him depone summarily *boc ordine*, tho' a member of the house. Fountainhall, 16th July 1687, *Fairholm contra Daes*. — A party having given in a summary complaint against an advocate and a writer to the signet, alledging that they had abstracted some of a defunct's papers, to whom the complainer was nearest of kin; the Lords found, That this was a malversation alledged on them, not committed by them in their office and trust as members of the college of justice, but wholly extrinseck thereto, and defamatory, as an accession to theft; therefore they refused to take it in *boc ordine*, but left the petitioner to his ordinary course by exhibition. Fountainhall, 3d December 1695, *Ld. of Prestongrange contra Bennet and Inglis*. — A summar bill being given in against the representatives of a writer and agent, craving warrant to get up papers summarily, upon receipt and inventory, and paying what was due to the defunct by accompt; but it being suggested, That these papers came not in the defunct's hands as writer or agent, but that he was also factor for managing their business, and some of the writs might be instructions of his accompts; therefore the Lords found, That they could not be given up in this manner, but that the agent's heirs must be called *via ordinaria* in an exhibition *tanquam quilibet*. Fountainhall, 28th December 1699, children of general Douglas *contra* representatives of Robert Colvil. — A writer to the signet in a dying condition, was found not obliged summarily to depone upon a petition touching his having of writs belonging to the petitioner, who could not say that the writer had received these writs from him, *ratione officii*. Forbes, 2d July 1708, *Temple contra Cunningham*. — A summary complaint being given against one of two tutors by the other, craving, That he being an under-clerk of session, might be removed from the office of tutory for his malversations; the Lords refused, in regard that his trust noways related to his office as a clerk, so that he was to be considered *tanquam quilibet*, Fountainhall, 26th January 1712, *Carruthers contra Sinclair*.

COLLUSION.

A PARTY having denounced in order to comprise, and the debtor suspending, the donouncer was preferred to another who denounced and completed his comprising, and got himself infest before the suspension could be gotten discussed, the said person having procured

cured the suspension by his own travel and expences. Durie, 28th November 1628, Borthwick *contra* Clark. ----- A comprising was found null by exception, because the debtor was brought within the country, to the effect it might be led upon fifteen days warning, to the prejudice of a third party, who had denounced before upon sixty days. Hope, (*Dolus*) 13th November 1620, Wardlaw *contra* Dalziel. ----- A compriser having charged the superior before another's comprising was led, and the superior having suspended the first, and freely entered the second without a charge; the first was nevertheless preferred, in respect of his diligence, altho' the other was infest, and three years in possession. Spotiswood, (*Comprising*) Durie, *ult.* January 1632, Fergusson *contra* M'Kenzie. ----- A similar case. Stair, 3d December 1664, Ld. of Clerkington *contra* Ld. of Crosby.

IN a competition betwixt a poinder and arrester, the latter was preferred, because the party in whose hands the arrestment was laid, had voluntarily exhibited and delivered the goods to the poinder's servant. Hope, (*Arrestment*) 7th February 1616, Dr. Kinloch *contra* Ld. Pitcur.

IN a competition betwixt the creditors and executors of a defunct, the Lords refused to prefer one creditor to another, altho' their diligencies were not alike, some of them having obtained decreets, and this because the executors had not oppos'd them, but had defended against the others, who otherways had been as diligent as they; for thus it would be in the executors power to prefer one creditor to another. Durie, Spotiswood, (*Creditor*) 20th January 1631, Brown's creditors competing.

COMMISSIONERS OF SUPPLY.

IN a competition, which of two persons was duly elected collector of the land-tax for the shire of Caithness, it was found, That, after elapsing of the day appointed by act of parliament, the sheriff of the shire was the proper officer to appoint another diet for the commissioners of supply their first meeting. 3d January 1729, Sinclair *contra* Sinclair.

IN a question betwixt Irvine of Bruckley and Forbes of Thornton, which of them was duly elected collector of supply for the shire of Mearns; it was objected by Forbes, That Irvine's party had proceeded to name their preses or conveener, before qualifying themselves to the government, which he apprehended to be a plain nullity, no less than acting as commissioners of supply without taking the oaths. This objection was repelled, and Bruckley's election found legal, conform to the directions of act 6th, parl. 1693. 11th July 1728.

By act of parliament both superior and vassal has a right to vote for the same L. 100 valued rent. 25th July 1735, Hay of Hopes *contra* Hepburn of Monkkrigg.

AN action being intended against the dean of guild of Wick and baillies of Thurso, as liable to the penalty of L. 20 Sterling, for having presumed to act as commissioners of supply in the shire of Caith-

ness, without being possessed of the qualifications required by the supply act, that is, without being infeft in the superiority or property, or possessed as proprietars, or liferenters of lands, valued in the tax-roll of the county, to the extent of L. 100 Scots *per annum*, or to the extent of L. 20 Sterling of real rent; the defenders were found not liable in the penalty of the act of parliament; for the Lords thought that these qualifications related only to the particular persons *nominatim* appointed commissioners, not to these appointed *virtute officii*. 1st January 1729, Sinclair of Frefwick *contra* dean of guild of Wick and baillies of Thurso.

COMMON INTEREST.

A PROCESS of removing at the instance of one adjudger, cannot proceed without concurrence of the rest, unless the pursuer offer a more solvent tenant, or a greater rent, in which case the interest of any person *in re communi*, cannot hinder the common advantage of all concerned, Stair, Fountainhall, 21st December 1680, *contra*

.---The removing in such a case allowed to proceed, upon the adjudger's finding caution to make the rents effectual. Falconer, November 1681, Halliday *contra* Bruce.

WHERE parties have a joint and equal interest in an estate, the principal writs fall to the keeping of the portioner, who offers caution to the others for their security, and he is bound notwithstanding to contribute in common for the charges of transumps. Dirleton, 26th January 1675, *contra*

.---An eldest brother preferred to the custody of the writs, tho' the estate was in Holland, where all the children succeed equally, and another brother had purchased in all the other children's parts. Dirleton, 29th February 1677, *contra*

.---In a dispute who should have the keeping of common evidents, the Lords appointed bonds to be given into the register, and either party to take out an extract at their own charges; and as to dispositions, charters, and other writs, they appointed them to be inventoried, and an obligation to be subjoin'd to the foot of the inventory, by the person who was to have the keeping of the writs, as having the greater interest, to make the same furthcoming to the other party upon all necessary occasions. Fountainhall, 25th December 1711, Dr. Pircairn *contra* Stevenson.---The eldest heir-portioner has the custody of the writs, and must give transumps to a younger sister upon the equal expences of both. Stair, 23d July 1680, Lady Margaret Cunningham *contra* Lady Cardross. Fountainhall, 21st July 1708, Cowie *contra* Cowies.---The same was found, tho' a younger sister had acquired right to another sister's proportion, and so had a greater interest than the eldest. Durie, 17th July 1638, Denholm *contra* Denholm.

COMMONTY.

COMMONTY.

IN the division of commonties betwixt a proprietor and others having servitudes, the proprietor ought to have a fourth part allocat to him *tanquam præcipuum*, as the value of his property, and the remainder ought to be divided proportionally, conform to the act 1695, amongst the neighbouring heritors, who have possessed the same as commonty, allowing the proprietor likewise a share in that division, effecting to his lands, whereof the tenants had promiscuous possession with the heritors of the dominant tenement. Home, 7th January 1724, Hog of Harcarfe *contra* Earl of Home. In this case the pursuit was at the instance of a feuar. But in a process of division of the commonty of Biggar, at the Earl of Wigtoun's instance against his feuars, some of whom were conjunct proprietors of the muir, others had only servitude of pasturage upon it: It was objected against the *præcipuum* by those who had servitudes, That the rights were derived from the pursuer's predecessors, and were a burden upon his property; that there was no foundation upon the act 1695, for pursuing a division, unless in the case of common property; that the defenders must be allowed to enjoy their servitudes as stipulate to them; that the proprietor was impowered to confine them to ground that might be sufficient for their servitude, but further he could not go: The Lords found the defenders, having rights of servitude, are entitled to have a proportion of the commonty set apart to them, equivalent to their right of servitude. 23d January 1739, Earl of Wigtoun *contra* feuars. — In a process of division, upon the act 1695, at the instance of a superior against his vassals, to whom he had granted servitudes of common pasturage upon a muir which was his property, it was found, That the act gives no title to pursue a division in this case. 1st February 1740, Sir Robert Stewart of Tillicultry *contra* his vassals.

In a process of division upon the act 1695 of a common property belonging to two neighbouring barons, the rule of the division was found to be not the value of the tenements that lay contiguous to the commonty, but only of the tenements which had been in use to pasture there. 6th November 1739, Sir David Dalrymple of Hails *contra* Hay of Drummelzier.

COMMUNION ELEMENTS.

A MINISTER charging for forty merks for communion elements; the Lords found the same due, tho' he had not given the communion, but ordained the same to be put in the poor's box, according to an offer made by the charger. Stair, Fountainhall, 29th November 1678, Birnie *contra* Earl of Nithsdale. — Found that the yearly modification for the communion elements cannot, when the sacrament is not administered, be diverted to the benefit of the minister, but

ought to be applied to the poor's use. Forbes, 21st July 1713, heritors of the parish of Abdie *contra* Corfan.

COMMUNITY.

How far a
community is
bound by the
deeds of its
magistrates.

FOUND that the magistrates of a burgh their acceptance of a charter, containing thirlage to a neighbouring miln, was sufficient to bind up the inhabitants from repudiating the charter, tho' they were not formerly subjected to the thirlage. But here the charter contain'd some new privileges in the town's favour. Fountainhall, 23d July 1700, Moncrief *contra* town of Abernethy. --- The magistrates of a burgh having granted bond for a large sum, as the price of a tack of tiends set to the town; the Lords refused to allow the burgh afterwards to quarrel the deed, as done to the prejudice of the community, on pretence, that they were as minors, but reserved to the town personal action against these magistrates who made the transaction. Falconer, 24th November 1685, Archbishop of St. Andrews *contra* town of Glasgow. --- In a reduction of a feu-right, and of a tack for two nineteen years, granted by the magistrates and town council, 17mo, As contrary to the 36th act, parl. 1491, which custom has so far only altered, that tacks may be set for longer than three years, providing the consent of the convention of burroughs be obtained. 2do, Lesion, the tack-duty being not the half of the yearly worth of the lands. The Lords, before answer, allowed the value of the ground to be tried, and the custom of the convention of burroughs ratifying tacks. Fountainhall, 1st February 1698, magistrates of Edinburgh *contra* Paterfon. --- In a reduction of a tack of the town's impost-duty, set by the magistrates or town council of Edinburgh; upon this ground, That it was for an under-value, without a publick roup; the Lords found, That the magistrates were not obliged to set the tack by way of publick roup; and found that the tacksmen having taken the tack from the magistrates, who had power to set the same to them, the reasons of reduction were not relevant against them; and therefore repelled the same, and affoizied the tacksmen, reserving to the pursuer to insist against the magistrates for mal-administration, as accords. 16th December 1735, M'Ghie and others *contra* magistrates and town council of Edinburgh. --- By act 28th, parl. 1693, magistrates who grant bonds *virtute officii*, without a previous act of the town council authorizing the same, are made liable to relieve the town of the said debt, without prejudice to the right and security of the creditor. And magistrates of a burgh having granted bond to their provost for the time, without following out the requisites of the act; it was found, that the bond did not prove its onerous cause, and therefore that as the pursuer, *qua* magistrate, would have been bound to relieve the town, had the bond been granted to a third party; so, being granted to himself, he can have no action, unless he will prove the onerous cause. Fountainhall, Forbes, 13th February 1711, Ross *contra* magistrates of Tain. --- A burges brewer of Edinburgh, possessing a tenement of land there, was found thirled to milns acquired by the good town, and annexed to the

the royalty many years after the erection thereof, such burgesſes, by ſeveral acts of the town-council, being ordained to go to theſe milns with their grain, under the pain of eſcheat of what is abſtracted, and payment of double multure, tho' it was alledged, That magiſtrates, who are but adminiſtrators for the good of the inhabitants, have no power to impoſe burdens upon them, and can no more, at their own hand, impoſe a thirlage, than they can impoſe two penies upon the pint of ale. Forbes, 31ſt July 1708, Montgomery *contra* Alexander.-----

The common good of burghs royal muſt be ſet yearly by roup. Stair, 27th January 1681, Jack *contra* town of Stirling. --- A proceſs having been raiſed by the burgh of Wigtoun againſt the burgh of Stranraver, the matter was ſettled by tranſaction, after this manner, That in regard Stranraver not being inrolled in parliament, was burdened with no aſſeſment, therefore the magiſtrates of Stranraver bound themſelves and their ſucceſſors in office, to pay to the magiſtrates of Wigtoun a certain proportion of whatever aſſeſments ſhould be laid upon them by parliament; the Lords found that the magiſtrates and council of Stranraver could not burden their town with this aſſeſment, and therefore reduced the contract. Stair, 6th January 1681, town of Wigtoun *contra* town of Stranraver.

In a purſuit at the inſtance of the magiſtrates of Glaſgow againſt John Barns their late provoſt, for payment of L. 1700 he was owing to the town *per* bond. Alledged for the defender, He is diſcharged of the ſaid bond by an act of council granted for the onerous cauſes of good ſervices done to the town; and 'tis ordinary to gratify the good ſervices of magiſtrates. Answered, Magiſtrates are but adminiſtrators of the town's common good, and cannot, more than curators, gift away any part. The Lords decerned againſt the provoſt. Marcus (*Magiſtrates*) 3d March 1685, Provoſt and magiſtrates of Glaſgow *contra* Barns.

Magiſtrates
cannot alienate
gratuitouſly.

MAGISTRATES of a burgh, againſt whom a decreet is taken as re-
preſenting the town, ceaſe to be liable after expiring of their office,
but diligence may be followed forth againſt the ſucceeding magiſtrates,
the ſame way as if the decreet had been taken perſonally againſt them.
Durie, 15th January 1624, Ld. Drumlanrig *contra* Baillies of Hawick.

Magiſtrates
bound as re-
preſenting the
town, if liber-
rate by expiry
of their office.

--- The late magiſtrates of a burgh having charged for the reſts of their miniſter's ſtipend, for which they had granted bond bearing annualrent, the Lords, notwithstanding their being only bound *ratione officii*, found them liable *in ſolidum* for the principal ſum and by-gone annualrents then reſting, but ſuperſeded extract for a time, and ordained the inhabitants to be ſtented for their reimbursement; and the inhabitants being cited for that effect at the mercat-croſs of the burgh, by virtue of their Lordſhips ordinance, the Lords appointed a perſon to ſtent them. Home, January 1685, Honyman *contra* town of Dyſart. --- Money being borrowed for the uſe of a royal burgh, and bond granted by the magiſtrates, binding themſelves conjunctly and ſeverally, and their ſucceſſors in office, the town only was found liable in payment, and not the ſubſcribers, after they were ex-aucterate. Fountainhall, 7th February 1695, Bowie *contra* Wilſon. --- In a purſuit againſt *quondam* magiſtrates for payment of a bond granted by them while in office, it was urged, That tho' regularly ex-aucterate magiſtrates are not perſonally liable for bonds granted by them,

virtute officii, the defenders must be liable in this case, in regard there is no succeeding magistrate against whom the pursuers can have action. The Lords, in respect of the answer, sustained process against the defenders, and decerned, superseding extract for a competent time, that the defenders might stent the inhabitants of the town, and affect the common good for raising the money. Marcus, (*Magistrates*) February 1686, Lawson *contra* Symson.

University
how far bound
by the deeds
of the masters.

COMMISSION granted by the major part of the masters of an university, was found sufficient to bind the university, unless, by the foundation, any of them were possessed of a negative. Stair, 31st January 1678, Lord Ross *contra* College of Aberdeen. — The college of Aberdeen setting a tack of tiends, to continue during their principal's life, and five years thereafter, with an obligation to renew the like tack, from time to time, for ever; the Lords found, That there being no sufficient cause onerous alledged for this obligation of renewing a perpetual tack, it could not be sustained in part, but that it was totally null. Stair, Gosford, 13th July 1669, Old College of Aberdeen *contra* the town. — Masters of a college, transacting for the benefit of the college, do bind their successors in office. Stair, 10th December 1675, Park *contra* university of Glasgow. — Found that an university may transact anent a mortification, whereof the event is uncertain and illiquid. Stair, 31st January 1678, Lord Ross *contra* College of Aberdeen.

Powers of
box-master.

THE office of box-master to a trade being annual, the Lords found, That he could only discharge the yearly duties (tho' the deacon subscribed with him) due the time of his office, unless the trade had given him an express warrant for it, upon a just and onerous ground. Gilmour, 24th June 1664, hammermen of Edinburgh *contra* Stewart.

In legal diligence against
a community,
who must be
cited.

THE Lords found an arrestment laid on in the hands of the treasurer of the trades maiden hospital a proper arrestment, and preferred it to an arrestment afterwards laid on in the hands of the said treasurer, and also of the governors and directors of the hospital: And they also preferred an assignation intimate in the same manner. 10th January 1739, competition creditors of Menzies of Lethem.

COMPENSATION. RETENTION.

Of old not
sustained in
our practice.

OF old no compensation could be received by way of exception, altho' it had been *de liquido in liquidum*, but action only reserved. Balfour (*Exception*) Sinclair, 5th May 1543, the Queen *contra* bishop of Aberdeen.

Nature of
compensation.

IN a question of compensation and recompensation, the Lords abstracted from the specialities that were pled in the case, and the dispute turned upon the general point, Whether compensation was the operation

tion of the law or of the judge? Some of the Lords were for the first, that it operated *ipso jure, eo ipso* that the parties became mutual creditors, and appealed to Stair, who lays down the rules for compensation and recompensation, as received with us, from the civil law. Others maintain'd, that compensation had no effect till it was propon'd and applied by the judge; that when compensation is sustain'd, our law, upon principles of equity, gives it an operation *retro* to stop the course of annualrent, and in that sense only is the common maxim to be understood, That compensation operates *retro & ipso jure*. Upon these principles it was urged to be optional to the party to propone it or not, or to propone it upon one or other debt; and supposing one debt better secured than another, why should he not be entitled to compensate upon the debt least secure? The vote was stated in these precise words, "Whether to the party creditor in more debts, it was optional which of them to make use of by way of compensation?" and it carried in the affirmative. 15th November 1738, Sir William Maxwell of Monrieth *contra* creditors of Sir Godfray M'Culloch.

RETENTION by the intrometter with the defunct's goods, of what was left in legacy to him, and of what was furnished by him to the defunct in meat, drink, and other necessaries, a month or thereby before her decease, was found relevant against the executors pursuing for these goods. Haddington, 24th November 1609, Russel *contra* Exception against payment or performance upon a liquid claim.

-----A creditor having proceeded to poid *bona fide*, not knowing of his debtor's death, in a process of restitution at the executor's instance, compensation or retention was sustained to the poider upon the debt due to him by the defunct, which was the foundation of the poiding. Fountainhall, 10th December 1707, Lees *contra* Dinwoody.

A PARTY being charged for a debt, and alledging in a suspension that he was cautioner in a testament, wherein the charger was executor, and was not yet relieved; the Lords ordained the charger to find caution for his relief, altho' no distress was qualified. Auchinleck, (Caution) 7th November 1632, Granger *contra* Lord Loudon. Exception upon a claim not liquid, but *ubi est parata executio*.

A CHARGE upon a bond being suspended upon this ground of retention, That the suspender was confirmed executor to the charger's defunct spouse, and was entitled to her share of the moveables in the charger's possession. It was answered, That by act 1592, Cap. 143, liquid debts only are allowed to be pled upon by way of exception. The act speaks not of compensation more than of retention; and as it is *triti juris*, that an illiquid claim cannot be offered in the way of compensation; to sustain it under the name of retention, would be truly giving it the whole effect it could have, when pled as a compensation, which would be allowing the thing, under another name. The Lords repelled the reason of suspension. 9th December 1735, Crawford of Bridgend *contra* Hamilton of Grange. An illiquid claim not sustainable, either as compensation or retention.

A RELICT being executrix to her husband, and tutrix testamentary to her son, after marriage with a second husband, having charged for bygone annuity, compensation was proponed upon her intromissions as executrix and tutrix; the Lords repelled the compensation, as being an illiquid claim, which cannot compensate one that is liquid. Bruce, What understood to be a liquid claim.

9th February 1715, Gordon *contra* Gordon. ----- An article of compensation was rejected as illiquid, being founded upon a process at the instance of an executor, having only a licence to pursue, without confirmation, and no sentence recovered, nor so much as proof led. Stair, 8th January 1663, Fullarton *contra* Viscount of Kingstoun. ----- A debtor being obliged to deliver a certain quantity of coals weekly, or, in case of failzie, four pounds for each chalder; this sum was not found liquid to be the foundation of a compensation, not being constitute expressly as a price, but being a personal failzie beyond the ordinary price, which cannot be liquidated till declarator and modification of a judge. Stair, 17th June 1664, Tulliallan and Condie *contra* Crawford. ----- Compensation being proponed upon a factor's intromissions, to elide a debt due to the factor, now in the person of an assigney; and it being answered, That there was no proof of the extent of the intromissions; and therefore, that the compensation was not liquid; the Lords found the compensation liquid, if the factory bore an obligation to do diligence; but if the factor was only liable for his actual intromissions, that the compensation could not be sustain'd, seeing it required a proof. Stair, 7th January 1680, M^r Bride *contra* Lord Melvil.

*Quod statim
liquidari potest,
pro jam liquido
habetur.*

THE Lords refused to receive an exception of compensation, founded upon certain bygone tiend-duties adebted by the pursuer to the compenser, because these consisted in victual, notwithstanding the defender offered to refer the debt, victual prices, &c. to the pursuer's oath. Hope, (*Compensation*) ult. January 1616, Earl of Linlithgow *contra* Ld. of Airth. Durie, 1st December 1626, Lady Balbegno *contra* Ld. of Lauriston. Durie, 6th December 1626, Campbel *contra* Ld. of Kinclaiven. The reason is, that the act 143, Parl. 1592, introducing compensation, gives it only place, *de liquido in liquidum*; and therefore, regularly, compensation cannot have place in debts not yet liquid, however soon liquidable by oath or otherwise: But in latter practice, the Lords have got over this rigorous interpretation of the act, adopting this maxim, *Quod statim liquidari potest, pro jam liquido habetur*.---Thus a claim was received by way of compensation, tho' illiquid, offered instantly to be liquidated by oath. Fountainhall, 13th February 1711, Ross *contra* magistrates of Tayne.---The like in a pursuit for payment of money, where the Lords found, That an exception of compensation proponed thus, *viz.* That the pursuer had intromitted with goods belonging to the defender to the value of the debt, must be verified *instanter* by writ or oath. Dirleton, 11th December 1674, Stewart *contra* M^r Duff. --- Compensation being proponed upon a bond produced, due by the charger's father, which he, the suspender, offered instantly to liquidate, by referring to the charger's oath that he represented his father; the Lords found the same relevant. Forbes, 31st July 1707, M^r Doual *contra* Agnew. --- In a pursuit upon a liquid bond, compensation was pled upon a charter-party, betwixt the pursuer and defender's husband; the Lords decerned for payment of the bond, but superseded extract for three or four months, that in the mean time the defender might have opportunity to liquidate her ground of compensation, by proving, that her husband had performed the voyage. Fountainhall, 22d November 1683, Seaton *contra* --- Compensation being proponed against a charge for a liquid debt, upon the pursuer's father's intromission with a sum of money belonging to the

the suspender, the Lords allowed the suspender five weeks to prove his ground of compensation. Fountainhall, 14th January 1686, Brown *contra* Eleis. A minor who was the heir of a cautioner being pursued, and getting a day to prove payment, and then also proponing compensation of a sum not yet liquidated; the Lords in this favourable case, and because the pursuer was delayed however, allowed the minor a term to prove his compensation. Fountainhall, 8th December 1697; Muir and Mulliken *contra* Kennedy.

COMPENSATION, like payment, may be founded on a *quocunque*. Stair, 7th January 1680, M^r Bride *contra* Lord Melvil. — A tutor and his cautioner being charged for payment of a bond granted by them, with relation to the pupil's affairs, were allowed to compensate upon a debt due to the pupil by the charger. Gosford, 5th February 1670; Earl of Northesk *contra* tutor of Cairns and his cautioners. — An heir pursued for his predecessor's debt, was allowed to compensate the same with a debt owing by the creditor to the defunct, tho' that being a moveable debt, belonged to his executors, and not to the heir who proponed compensation. Forbes, 20th February 1712; Hay *contra* Crawford. — A debtor being cautioner for the creditor in another sum, and the creditor craving payment, it was found, That law gives him retention, *quoad concurrentem quantitatem*, until he be relieved, because on the faith of that debt he probably became cautioner, otherwise he would not have bound for him; but, in the present case, the retention being craved by a creditor of that cautioner, who had not affected the relief *speciatim & directe*; yet the Lords found that it was transmissible, and competent to the cautioner's creditor, as well as to himself, tho' it was alledged, That retention was a weaker and more personal right than compensation, because the latter, *ipso jure*, extinguishes; whereas the first is only *exceptio doli, quæ personæ coheret, non rei*, which the Lords repelled, seeing the Law says, *Etiam ob chirographarium debitum pignus retineri potest*. Fountainhall, 1st July 1709, Strachan *contra* town of Aberdeen. — In a competition among creditors, compensation was sustained against an adjudger, upon a debt due by him to the common debtor, tho' it would not have been competent to the common debtor himself, who neglected to propone it in the process of constitution carried on against him by the adjudger, it being urged for the other creditors, That they were entitled to propone this compensation during the said process of constitution, and they could not be cut out of their interest by the decret in which they were not made parties; tho' here it was answered for the adjudger, That to allow creditors to propone compensation after the debtor's privilege is at an end, in whose name they can only plead it, would be the same as allowing a creditor to reduce upon minority and lesion, after the lapse of the *quadrennium utile*. 30th June 1738, Rae and Fergusson *contra* clerk of Glendorch.

Who entitled to propone compensation and retention;

COMPENSATION was admitted against an assigney. Haddington, 16th January 1611, Carnwa *contra* Stewart and Ewing. Durie, 14th February 1633, Keith *contra* Heriot; and this, tho' the debt, which was to compensate the other, was contracted after the assignation, but before intimation thereof. Hope (*Compensation*) 20th December 1610, Ogilvie *contra* Napier. — A master being pursued by a tenant's one-

Against whom competent. 1mo, If good against an onerous assigney.

rous assigney, his compensation was sustained, tho' upon a decret against the cedent, posterior to the assignation, the decret being for bygone farms long before the assignation. Durie, 11th January 1627, Paton *contra* Barclay.

2do, If retention be good against an onerous assigney.

A MAN being first debtor, and thereafter becoming cautioner for his creditor in a bond for the like sum, bearing a clause of relief, and the creditor having, after the cautionry, assigned the bond, and it being intimated, the Lords sustained compensation and retention, in respect that the compenfer was creditor by the clause of relief, prior to intimation of the assignation. Marcus, (*Compensation*) January 1683, Sibbald *contra* Turnbull. Home, December 1684, Scrimzeour *contra* Ld. Gadgirth. --- The like, Durie, 15th November 1627, Black *contra* Dick. Forbes, 14th February 1708. Fountainhall, 1st July 1709, Strachan *contra* town of Aberdeen. --- An assigney to a tack pursuing for the rent, the tenant pled, That he had become cautioner for his master in a bond, upon the faith of retaining his tack-duty for his relief; the Lords found, That this did not operate against an assigney. Fountainhall, Forbes, 26th February 1709, Lord Bowhill *contra* Jackson.

3tio, If propo-
nable a-
gainst an heir
who has the
benefit of dis-
cussion.

A FATHER taking a bond to himself, and, failing of him by decease, to a younger son *nominatim*; the son, after the father's decease, got a bond of corroboration from the debtor, and charging thereupon, compensation was proponed against him upon a debt due by the father to the suspender, before granting the bond of corroboration; the Lords found the compensation not receivable in this case, partly in respect it was understood past from, by granting the bond of corroboration, and partly because the charger was not liable for his father's debts, until his other heirs were discusst. Fountainhall, 18th December 1696, Robertsons *contra* Robertson.

4to, If a-
gainst execu-
tors.

FOUND that a legatar, *eo ipso* that the executor is confirmed, becomes his creditor, and may compensate a debt owing by him to the executor; nor is it sufficient to stop compensation, that the legatar has not obtained decret against the executor, tho' it may be that nothing will be due to him of his legacy, or at least not all, if the testament be exhausted. Spotiswood, (*Executor*) 12th November 1628, Williamson *contra* Tweedie. --- Compensation being proponed against one of four co-executors, it was alledged, That it could not take place but for the fourth part; it was found that compensation being equivalent to a discharge, taking away the debt *ipso jure*, it might be proponed against any of the executors *in solidum*. Stair, 15th June 1666, Stevenson *contra* Ld. of Hermishills. --- Compensation against the executor is not competent to a debtor of the defunct, taking assignation to one of the defunct's debts after his death, but he will, in competition with other creditors, be in the same situation with his cedent, as if no such assignation had been made. Stair, Gilmour, 14th February 1662, executors of Mouswal *contra* Laurie. --- The like, Stair, 8th February 1662, Crawford *contra* Earl of Murray. --- The Lords having reduced a posterior confirmation of a creditor, because the relict had already obtained herself confirmed; and she next pursuing the said creditor for restitution of some of the defunct's goods, which he had pointed by virtue of his said title, which was found null, yet the Lords allowed him compensation upon the debt due

due to him by the defunct. Fountainhall, 10th December 1707, Lees *contra* Dingwoodie.

A TENANT having paid up his rent to his master for eight or ten years, and the ministers stipend standing out unpaid all that time, was found to have retention of a term's rent confirmed by the executor-creditor after the proprietor's decease, until he should be relieved at the hands of the minister. Marcus, (*Escheat*) March 1685, M'Reith *contra* Kennedy.——The Lords sustained compensation against an executor-creditor, upon payment of a cautionry, tho' the distress was after the confirmation. Fountainhall, 13th February 1679, Carfewel *contra* Semple.

THE Lords refused compensation, because the proposer had taken assignation to the debt after arrestment was laid on in his hands, which tended to gratify one creditor in prejudice of the lawful diligence of others. Fountainhall, 19th July 1678, Warrock *contra* Brown.

ARRESTMENT being laid on, affecting bear purchased by the arrestee and common debtor, retention was sustained against the arrester, until the arrestee should be relieved of the price of the common debtor's half. Fountainhall, 24th December 1679, creditors of Gordon *contra* Captain Binning.

IN a special declarator at a donatar's instance, against a debtor of the rebel; the Lords found, That compensation was proponable against the donatar, so as to meet this action, as if it had been objected against the rebel himself. Durie, 26th July 1622, Davidson *contra* Ld. Buckie. Durie, 3d March 1629, Fletcher *contra* Ld. Craigevar. Stair, Gosford, 23d January 1669, Drummond *contra* Stirling.

RETENTION of a debt due to a rebel at the horn, is competent to the debtor against the donatar, on account of the debtor's being cautioner and under distress for another debt, due by the rebel before his rebellion. Spotiswood, (*Escheat*) Durie, 3d February 1635, Innes *contra* Lesly.——A donatar of escheat, after general declarator, insisting in a special declarator for certain tiend-bolls, adebted by the defender to the rebel, retention was sustained upon a liquid debt owing by the rebel to the defender before the rebellion. Durie, 24th February 1635, Ld. Halgreen *contra*

AN assigney who, by a back-bond, stood bound to apply the contents of the assignation when recovered, for payment of certain debts wherein he the assigney was cautioner for the cedent, having thereafter become creditor by progress to his cedent in a pure debt, compensation was oponed to him upon the contents of the said assignation now uplifted; the Lords found, That the contents of the assignation, destined for relieving the assigney of his cautionry, could not be apply'd by the cedent to other purposes, such as to sopite a separate debt by compensation. Dalrymple, 8th December 1699, Douglas of Kilhead *contra* creditors of Boughtrig.

A FACTOR cannot retain or compensate his intromissions by any of his constituent's debts assigned to him after his intromissions. Stair, 9th November 1672, Pierson *contra* Crichton. Fountainhall, 24th July 1678, Marquis of Douglas *contra* Somervell.

If good against an assignee.

A PARTY having got assignation to an adjudication, and given his back-bond, either to pay or denude, and he, when sued upon the back-bond, pretending to retain till he was satisfied of a plain liquid bond made to him by the granter of the assignation; the Lords considered that this was a trust, and that *redde depositum* was *juris gentium*, and that compensation was neither competent nor receivable against a *depositum*; therefore they repelled the compensation. Fountainhall, 23d February 1697, Scot *contra* Scot. --- A person having disposed his estate to two of his friends under trust, for certain uses, with this quality, That what remained thereof, after payment of his debts and Legacies, should be equally divided betwixt his two brothers; and one of the brothers chancing to die after the disposer, before execution of his will by the trustees, who afterwards lodged the superplus of the free gear in the hands of the surviving brother, to be kept and made furthcoming by him to such as should be found to have best right; the Lords found, That the depositor, who was creditor to his brother last deceased in a liquid Bond, could not detain the deposited money, for payment of his debt, in a competition with other creditors that had confirmed the subject as executors-creditors to the defunct, Forbes, 16th July 1709, creditors of Stewart *contra* Stewart.

Real and personal debts, if mutually compensable.

A REVERSER having consign'd the wadset sum upon an order of redemption, the same was decreed to be delivered up to an appriser of the wadset lands, and was found not compensated by a separate liquid claim owing by the wadsetter to the reverser, and that because no compensation can be betwixt an heritable right and moveable sum. Durie, Spotiswood, (*Redemption*) 25th March 1629, Earl of Buccleugh *contra* Young. --- Found that an infestment cannot be compensated with a personal debt. Gilmour, February 1662, Ld. Whitekirk *contra* Ld. of Ednem. --- In an infestment of annualrent, according to the new form, where there is both a subsisting personal obligation, and an accessory infestment in security, compensation was not admitted against a singular successor, unless upon debts due by the cedent before infestment, when the bond was merely personal. Stair, 8th July 1680, Rankin *contra* Arnot. Home, February 1682, *inter eosdem*. --- The bygonies of an infestment of annualrent are moveable, and therefore compensable by any liquid debt of the annualrenter, even against a singular successor in the annualrent-right. Stair, 2d January 1667, Oliphant *contra* Hamilton. --- Compensation may be proposed upon sums whereupon apprising is led; because apprising is but an accessory security, a *pignus*, and does not absorb the debt. Stair, 18th June 1675, Ld. of Leyes *contra* Forbes. Stair, 12th November 1675, Home *contra* Home. --- But compensation was not sustained upon a wadset, which contained a clause of requisition, because, until requisition, there was no debt. *Ibid.* --- The Lords sustained compensation of the sums in an adjudication, by extrinsic intromissions and debts otherwise due, as well as by intromission with the rents of the lands, so as to extinguish the adjudication, these debts being existent before expiring of the legal of the adjudication. Home, March 1682, Lord Saline *contra* Callender. --- Intromission with a deditor's executry sustained to extinguish an apprising of his lands. Marcus, (*Compriking*) 17th March 1682, Baillie *contra* Hisside. --- Found that a moveable bond might compensate and extinguish an heretable one by decret of com-

comprising, but not *e contra*, unless it were loosed and made moveable by a requisition or charge. Fountainhall, 13th January 1697, Daes *contra* Johnston. Durie, 14th February 1633, Keith *contra* Heriot. --- A liquid sum for a house-mail cannot be suspended upon compensation, founded upon the tenant's right of retention of any annualrent wherein he is infeft furth of the tenement, he having no decret for poinding the ground, nor personal liquid decret against the heritor or liferenter. Haddington, 4th June 1611, Hamilton *contra* M'Cartney.

THE Lords refused to admit compensation by way of suspension, tho' instantly verified, seeing it was not proponed before sentence, tho' the suspender had then compeared but proponed it not: And this conform to 141 act, 12th Parl. James VI. Durie, 1st December 1626, Viscount of Stormount *contra* Spotiswood (Compensation) Viscount of Stormount *contra* Duncan. Auchinleck, (Compensation) 17th February 1632, Walker *contra* Mainquhair. Fountainhall, 5th December 1710, Nasmith *contra* Bowman. But this does not hold as to decreets of baron-courts. Gilmour, June 1662, Earl Marishal *contra* Brag. --- Compensation not even receiveable against decreets in absence, unless where made null, and turned into a libel. Stair, 25th July 1676, Wright *contra* Shiel. Stair, Fountainhall, 5th February 1678, Logan *contra* Coutts. --- And still further, a party in a suspension of a decret *in foro*, proponing compensation, which had emerged after the decret; so that here it was not industriously omitted to be proponed, *prima instantia animo protelandi litem*; the Lords nevertheless found the statute general, and repelled the compensation. Fountainhall, 9th July 1697, Gordon *contra* Melvil. 29th June 1739, Anderson *contra* Schaw. --- But compensation being proponed after a decret in absence, the decret being against him among many others, the Lords found, That a decret in absence against debtors, excludes not compensation. Forbes, 20th, Fountainhall, 21st March 1707, Corbet *contra* Hamilton.

A DEFENDER, who was barred from pleading compensation, in the second instance, by way of suspension, turned his defence into the shape of retention, alledging, that the charger was bankrupt, and therefore, upon the suspender's making payment, the charger should be bound to find caution to be law-biding for the counter-claim; which the Lords found relevant. Marcus (Compensation) January 1683, Barclay *contra* Clark. 18th February 1736, M'Claren *contra* Bisset.

THE Lords sustained compensation by way of exception, altho' it could not be pursued by way of action, the ground of the compensation being long since prescribed. Fountainhall, 31st January 1705, Gordon *contra* Hay. Forbes, 20th, Fountainhall, 21st March 1707, Corbet *contra* Hamilton. --- Compensation not proponable upon a debt sope by the forty years prescription, and this tho' there was a *concurfus debiti & crediti* long before the running of prescription. Home, July 1719, Carmichael *contra* Carmichael.

COMPENSATION proponed by a debtor against an assigney, was found not relevant, being upon a debt of the cedent's, purchased in deed

deed by the debtor before the date of the assigney's right, but not intimated to the cedent, till he was entirely denuded by his assigney's intimation to the debtor. Stair, 22d January 1663, Wallace *contra* Edgar. The like. Dirleton 12th December 1665, Fergusson *contra* More. Stair, Dirleton, 4th July 1676, Rollo *contra* Brownley. The contrary had been found. Durie, 16th March 1639, Forsyth *contra* Coupland. ---- An intrometter with a rebel's corns, being pursued by the king's donatar to the single escheat, the Lords refused to sustain any compensation at his instance, as being creditor to the rebel; especially, because the time of the intromission, the party was already rebel, and so the intromission was with that which was the king's, and so could not be retained as pertaining to the rebel. Spotiswood, (*Escheat*) 20th January 1629, Ross *contra* Butler. ---- The debtor of a rebel taking assignation, and intimating before his escheat is gifted and declared, may compensate against the donatar, but not after it. Fountainhall, 1st January 1679, Dickson *contra* Edgar. ---- A claim not liquidated by sentence before apprising, was found not to compensate to the prejudice of the appriser. Falconer, 22d November 1683, M' Brair *contra* Crichton. ---- An adjudger infest, pursuing for mails and duties, compensation was not sustain'd to the tenant upon a debt due to him by his master against whom the adjudication was led. Fountainhall, 6th November 1697, creditors of Clark *contra* Dewar. ---- In a mails and duties at the instance of an annualrenter against the tacksmen, the defence as to the bygone rents falling due before citation, was compensation by an equivalent sum that his master was due him by bond; it was agreed, That the tacksmen would have been safe, had he paid up these rents before citation; and from thence it was argued for him, That compensation operates *ipso jure*, which brings this case to the same with actual payment. It was answered, That compensation operates not till it be proponed, and tho' it might have been proponed against the master, it cannot now be proponed against the annualrenter, after citation in the mails and duties, who has a real right to the ground, more than against a singular successor infest in the property. The Lords found, That compensation cannot be sustained against a prior infestment for bygone rents, the same being *in medio*. 19th December 1733, annuitants of the York-building company *contra* Buchan. ---- Compensation upon a debt due by the tacksmen to his sub-tenant, was found competent to be proponed against the master, compensation being payment in law. Gilmour, 13th February 1664, Hodge *contra* Brown. ---- An assigney to a tack pursuing the tenant for the rent, and he proponing compensation, first, That his master owed him a sum *per* bond, and then, That he was caution for him in another sum, wherein he had engaged in hopes of retaining his tack-duty for his relief; the Lords found, That the intimation of the assignation interrupted the compensation for the subsequent current years that fell due after the said intimation, but, as to years preceeding, they found, That the compensation took place because of the *concurfus debiti & crediti*. Fountainhall, 25th, Forbes, 26th February 1709, Lord Bowhill *contra* Jackson. ---- A debtor being charged for payment of a liquid sum, suspended upon compensation, condescending upon rents due by the charger as tenant to the proprietor of the land, from whom the suspender had a factory to uplift his rents; the Lords repelled the ground of compensation, seeing the debt upon which,

which compensation was craved, was not due to the suspender, *proprio nomine*. Forbes, 27th, Fountainhall, 28th December 1711, Fergusson *contra* Muir. --- Compensation of a bond of borrowed money, was refused to be sustained to the granters, upon a debt due by the creditor to their pupil, which they had no right to, altho' they offered to prove by his oath, that they borrowed the money from him upon the pupil's account, and the pupil, now major, was content to apply her debt to extinguish the bond. Forbes, 29th June 1711, Eliot *contra* Eliots. --- Compensation found relevant against a gratuitous assigney, tho' the liquidation thereof was after the intimation. Stair, 18th January 1676, Crockat *contra* Ramsay. --- A party having assigned a debt to his son-in-law, and the debtor, when charged, suspending on compensation, he having acquired right to a debt due by the cedent; only here the cedent was denuded and the assignation intimated before the suspender acquired right to his ground of compensation. The Lords found, That the compensation could not meet the assigney, without prejudice of reducing the assignation upon the act 1621. Fountainhall, 23d January 1711, Alison *contra* Duncan. --- A man being pursued for a sum contained in his ticket, granted to one who was his factor beyond the seas, and alledging, that the said factor had much more goods of his in his hands than would compensate the debt; this was refused to be sustained, unless he would alledge, That the factor had sold the goods, and had the prices in his hands. Durie, 1st July 1631, Eliot *contra* Ellies.

COMPENSATION being sustained upon a decret, liquidating a quantity of victual due by the charger to the suspender, the same was found to operate from the time the victual became due, and was not restricted to the date of the decret. Stair, Gosford, 5th February 1669, Cleland *contra* Stevenson. --- The question occurring *a quo tempore* compensation should take effect, whether only from the date of the sentence, by which the claim is liquidated, or from the time it became originally due? It was found, That money may be compensated by debursments of money from the time of debursment or intromission with money-rent, but not by victual or any prestation until the same be liquidated or reduced into money. Dirleton, 3d, Stair, 4th December 1675, Watson *contra* Cunningham. --- A debtor oponing compensation to an assigney upon a claim of warrandice incurred by the cedent, the compensation was found not to take place from the time the warrandice was incurred, but only from the liquidation thereof. Stair, Gosford, 23d July 1675, Cruickshank *contra* Ker. --- A man for security of a sum due by heritable bond, getting a tack of some lands, for a duty equal to the annualrent of the sums at *six per cent.* and being besides obliged to pay yearly two wedders, and two stones of butter, during the twenty one years that the tack was to last, and he never having paid these; in a declarator of extinction and payment, the Lords having first caused liquidate the prices of the wedders and butter, did then find, that they could only compensate and impute from the time of the liquidation, and not yearly when they fell due. Fountainhall, 22d, Forbes, 23d November 1711, Murray *contra* M'Guffock. --- The price of spuilzied goods found to compensate and sist the course of annualrents of a debt due to the spuilzier, from the time of the liquidation, and not from the time of committing the spuilzie. Marcus,

Effect of
compensation

(*Compensation*) 2d February 1687, *Weemyss contra Goodfir*. --- A nobleman's commissioners having compted with his factor, struck a balance upon the whole, save as to six articles, which were kept open to be adjusted with the constituent himself, and accordingly a docquet is adjected to the accompt, with a reservation of these articles, which were not liquidated till about ten years thereafter; the factor now insisting for payment of a bond due to him by his constituent, it was found, That the fitted accompt, bearing the foresaid reservation, was not a liquid ground of debt upon which compensation could be sustained, seeing reserved articles, some of which were sustained, fell to have entred into that accompt to diminish the balance; and therefore, sustained compensation from the date of the total clearance only. January 1733, *Graham contra Duke of Montrose*.

May be paid
from before
decreet.

*BEFORE Litiscontestation or decreet, the defender may pass from his defence of compensation, so as to be at liberty to use the writ upon which he compenses to any other purpose. Stair, 14th July 1664, *Balmerino contra Dick's creditors*.

If sustain-
able to have an
irritancy from
being incur'd.

COMPENSATION sustain'd to purge an irritant clause. Haddington, 17th July 1625, *Ld. Touch contra Fairbairn*. The contrary. Stair, Fountainhall, 26th July 1678, *Ld. Pourie contra Hunter*.

Effect of
retention.

A DEBITOR, who stood also bound for his creditor in greater sums, refused to pay, unless he were relieved of his whole engagements; the Lords found the defender liable to apply the sum wherein he was debtor for payment of the debts for which he stood bound, but gave him his option to pay one or other, as he thought proper, so far as the sum in question would extend, and that at the sight of the Lord ordinary. June 1729, *Marquiss of Clidisdale contra Cochran of Ochiltree*.

Recompen-
sation.

IN a suspension of a charge on a bond, the suspender craving compensation of a sum due to him by the charger *per bill*, and the charger proponing recompensation, because he was cautioner for the suspender in a bond for a greater sum, and therefore, that he must have retention of the sum in the bill till he be relieved, tho' the charger was not yet distressed; the Lords found, That the retention took place against the liquid compensation, and that he was not bound to let the debt be extinguished by compensation, till he was relieved of his cautionry. Fountainhall, 10th July 1711, *Irvine contra Menzies*.

RETENTION that arises from the nature of a mutual contract. See *Mutual Contract*.

RETENTION against tutors and curators and their assignies, ante redditas rationes. See *Payment*.

RETENTION by an executor, for debts due to himself. Ibid.

RETENTION against a factor's assigney. Ibid.

COMPETENT.

A DECREE of an inferior judge, pronounced upon the liquidation of prices without probation, was found null, without necessity of reduction. Erskine, 4th November 1593, *contra* Decree cannot be taken away but by reduction.

Found that a decree of the Lords cannot be taken away by exception, altho' pronounced manifestly against the act of Parliament. Colvil,

May 1582, Douglass *contra* Weemyss. ---- A decree pronounced against a party absent, *rei publicæ causa*, was found not to be *ipso jure* null, but that it must abide the course of a reduction. Haddington, 26th November 1594, Earl Morton *contra* L. Fleeming. ---- A writ being reduced for not production, found, That the decree cannot thereafter be taken away by the party his compearing and offering to produce, and abide by the writ, alledging, That the not production was through his tutor's fault, when he was minor; but found, That he behoved to reduce it as accords. Haddington, 15th June 1605, Miller *contra* Spang. ---- A decree against a minor, as lawfully charged to enter heir, being suspended upon production of a renunciation; the Lords found, That this renunciation might yet be received by way of suspension, without necessity of a reduction. Durie, 25th January 1628, Kennedy *contra* M' Dougal. A nullity proposed by way of reply, was refused to be sustained against a standing decree, altho' the nullity was, That it proceeded upon an infestment of kirk lands not confirmed, which can produce neither action nor exception. Durie, 24th November 1632, Hynd *contra* Ld. Wedderburn.

THE Lords refused to take away a standing comprising, *ope exceptionis*, tho' it was for an heritable debt, never made moveable by a charge. Decree of comprising. Spotiswood, (Comprising) 24th February 1627, Couper *contra* M'Martin. Spotiswood, (Comprising) 10th July 1634, Lord Balmerino *contra* Elliot of Stobbs. ---- An adjudication being challenged, as following upon a charge to enter heir, the person charged not being the nearest heir; this was found competent to the nearer apparent heir without reduction, tho' infestment had past upon the adjudication. Stair, 10th July 1662, Ker *contra* Ker of Fernilee.

A PARTY being decerned executor-dative *qua* nearest of kin, when there was a nearer; the Lords found, That his title, in a process at his instance against the defunct's debtors, was not quarrelable summarily, before the Lords, upon the act 26th, Parl. 1690. by the nearest of kin compearing for his interest, but that he must first apply to the commissaries for reduction of the decree-dative, and preference. Forbes, 6th December 1709, Hamilton of Bangour *contra* Lady Ormiston. ---- A defunct's only child pursuing her step-mother as executrix for her bairns part, *viz.* the third of all; the Lords sustained this action, altho' there was a standing confirmed testament, where the division was only made bipartite; but they found no necessity of reduction here, because the daughter was not called to the said confirmation. Durie, 27th February 1627, Ross *contra* Kelly. ---- The debtor of a defunct assailed, in a pursuit at the executor's instance, by compensation upon a debt due to him by the defunct, being reconvened on

the same account by another executor, who offered to improve, *incidenter*, the execution of the edict whereupon the first confirmation proceeded; the Lords found that the defender was not obliged to abide by the verity of the execution, and that improbation was not competent in that state of the process. Forbes, 10th December 1707, Lees *contra* Dinwoody.

Service of
an heir

AN exception in a declarator of bastardy was sustained, being founded on the service of an heir to the alledged bastard, which being a standing sentence, the Lords found sufficient to elide the gift, so long as it stood unreduced; and this was found, altho' the service was not retoured, nor past the chancery, and altho' it should never be retoured, the person having died shortly after the service. Durie, 22d July 1626, M'Culloch *contra* Ld. Merton. — One being retoured heir to his grand-father, and charging the superior to enter him; the Lords found, That the superior ought to comply therewith, tho', at calling the suspension, compearance was made for the father's assigney, who alledged, That the father was infest as heir to the grand-father, and had disposed to him, all which he instantly verified; but this was not found receivable *boc loco*, because the grand-son's retour was a standing sentence, and therefore behoved to be reduced in common form, tho' this objection would have been sufficient to stop the service. Durie, 14th December 1627, Beg *contra* baillies of Lanerk. — In a like case, the father's assigney being in a reduction of the retour, it was objected, That the retour could not be taken away by a simple reduction; that it behoved to be by a summons of error, for reducing the service by an inquest of error, to be pursued in latin by a precept out of the chancery. Answered, No necessity for this form, unless there were a nearer heir, which would make the service erroneous; but here the inquest did their duty, seeing the grand-father's infestment was produced to them, and no infestment denuding him; the Lords found the reduction receiveable *boc ordine*. Stair, 7th July 1663, Mow *contra* Dutchess of Buccleugh. — Yet thereafter a donatar of forfeiture having obtained a warrant for retouring the rebel, five years in possession of certain lands, and the inquest having served *negative*; in a reduction of the retour, as contrary to the testimonies of the witnesses adduced, it was found no process, because the reduction of retours is competent only by a summons of error; tho' the custom had been, of a long time before, to sustain simple reductions, where the design is only to reduce the retour, without insisting against the assizers for their error. Stair, 28th June 1667, Home *contra* creditors of Kello. — The reduction of a retour may now be by an ordinary summons, without necessity of a precept out of the chancery in latin under the quarter seal; and the act of sederunt in 1633 is now in desuetude. Fountainhall, 20th July 1680, *contra* — A brother retoured heir to his father in an annualrent, preferred to his sister, who had been before retoured heir in the same, when he was abroad, without necessity of reduction. Durie, 16th February 1627, Lord Colvil *contra* Herd. — A daughter being retoured heir to her father, and another being thereafter settled and retoured as son and heir to him; and the daughter craving preference in respect of her sentence, alledging, That her brother was dead before the service, and that the procuratory was counterfeit; the Lords, notwithstanding her decret, found

found, That if the son's procurators would offer to prove that he was in life the time of his service, they would prefer him; and found no necessity to reduce the daughter's retour or decret. Durie, 2d February 1632, Muirhead *contra* Lighton. — A younger brother being served; before an inferior judge, heir to his immediate elder brother; but thereafter the eldest desiring to be served heir of conquest, and the judge demurring because of the former service; the Lords allowed the eldest to advocate upon iniquity to the macers; and found, That he not being called to the service, ought not to be prejudged thereby, nor put to the charges of a reduction. Dirleton, 4th January 1677, Mitchelson *contra* Mitchelson. — A defunct person of quality's second brother, being abroad at his decease, and the third brother serving himself tutor-in-law to the defunct's children; but the second brother returning home, and taking out brieves for serving himself tutor thereon; upon a summary petition to the Lords by the third brother, bearing, That *tutorem habenti, tutor dari non potest*; and that having been long in possession, his gift must be reduced, and the other prove that he was elder brother: The Lords considering that this was *notorium, quod non eget probatione*, and that the tutory was, *ipso jure*, null, and needed no reduction, they summarily annulled it, and ordained the second brother's brief to go on. Fountainhall, 26th July 1688, Ramsay *contra* Ramsay.

THE preferable creditor, tho' cited, neglecting to appear in a multiple-poining, another creditor obtained decret of preference; the preferable creditor raised a second suspension and multiple-poining in the tenants names; the Lords found, That it was not competent for him to quarrel the decret in this shape, but that he must necessarily insist in a reduction according to act of parliament 1584, *Cap. 3*. Stair, 1st February 1670, Watson *contra* Simpson.

Decret of preference upon a multiple-poining,

FOUND, That no exception of iniquity, nullity, &c. can be proponed against a decret arbitral; a reduction being only competent. Balfour, (*Arbitration*) 11th February 1540, Hamilton *contra* Hamilton.

Decret arbitral.

FOUND, That a horning cannot be taken away by exception. Maitland, 1590, commendatar of Kilwinning *contra* Ld. Blair. Colvil, July 1583, Logan *contra* Carlisle. — In a declarator of escheat, the Lords refused to receive an alledgance, that the party dwelt *alibi* the time of the charge than where the execution did bear him to have dwelt, by way of exception, but reserved to him reduction of the horning. Durie, 14th December 1621, Earl Winton *contra* Stair, 22d July 1662, Montgomery *contra* Montgomery. Fountainhall, 18th June 1712, Scot *contra* Ker. Spotiswood, (*Horning*) 11th January 1629, Earl Galloway *contra* Gordon. — In a declarator of escheat, it was found not enough to except, that before denunciation the debt was paid and discharged, but the horning behoved to abide a reduction, to which the officers of state must be called, because the rebel and creditor might collude in prejudice of the fisk, by antedating the discharge. Spotiswood, (*Escheat*) Durie, 30th November 1630, Douglas *contra* creditors of Wardlaw. A horning was found null, even by exception, being upon an act of the kirk-session for a contribution

Objections against a horning, if proponable by exception.

to a school-master, because the party was neither cited, nor did consent thereto. Hope, (*Horning*) 23d June 1625, Somervell *contra* Grant. ---- In a special declarator of escheat, the Lords found an exception of nullity against the horning relevant, *viz.* That the charger was to find caution in a lawburrows; caution being really found before denunciation, and within the days of the charge, all which being instantly verified, the horning was found null, notwithstanding of the sentence of general declarator. Durie, 29th November 1626, Ld. Smetoun *contra* relict of Speirs.

Objections
against a stand-
ing infestment,
how propon-
able.

It being objected to the pursuer's infestment, That it was null, as proceeding upon a retour, whereby the pursuer was served heir before a sheriff, within whose jurisdiction the lands did not ly; this objection was not received by way of exception, but reserved to reduction. Durie, penult. July 1628, Martin *contra* Birfs. ---- An alledgance that a sasine is null, because the person signing it as notar, was never admitted regularly to that office, cannot be received in a multiple-poiding, but must be pursued by way of action. Durie, 26th June 1634, L. Johnston *contra* Earl of Queensberry. ---- A sasine given to an heir, upon his retour, by a wrong superior, cannot be taken away by exception or reply. Haddington, penult. January 1612, Arthur *contra* Ld. of Blebo.

Objections
against an in-
hibition.

AN inhibition being executed against a person living within a regality, not at the head burgh thereof, nor registred there, but at the head burgh of the shire; the Lords refused to receive the alledgance by way of exception, but reduction, *prout de jure*, was reserved to the party. Durie, 25th July 1628, Stirling *contra* Panter and Ogilvie.

Bankruptcy
how propon-
able.

A RIGHT by infestment, granted contrary to the act of parliament 1621, cannot be challenged by exception, but by reduction. Stair, 19th June 1663, Reid *contra* Harper. The same, 22d July 1664, L. Laurie *contra* Lady Craig. ---- Tho' deeds done in defraud of creditors against the act 1621, regularly, need reduction; yet, in a personal right, the matter depending before the Lords, and the parties poor, such a deed was found simply null. Stair, 5th January 1669, Syms *contra* Brown. ---- A disposition to a conjunct and confident person against the act of parliament 1621, was found null by exception, it being no heritable right requiring the production of authors rights. Stair, 16th June 1671, Bowers *contra* Lady Couper. ---- It being alledged in a suspension, at the instance of some creditors of a party *operatus*, against another creditor, That he had taken sasine upon his heritable bond, after the debtor was become bankrupt; and the Lords having refused to take in this alledgance by way of suspension or exception, and thereupon an executed declarator of bankruptcy being produced, and it being contended, that it should be reserved to come in *via ordinaria* by the course of the roll; yet the Lords received in the declarator *hoc ordine*. Fountainhall, 10th January 1708, creditors of John Davie competing.

Objections
against rights
granted by
ecclesiasticks.

IN a spuilzie of tiends, the defender excepting upon a current tack from an abbot, and it being replied, That the tack is null, as set in diminution of the rental, against the act 1581; the Lords found, That this ought to abide reduction, and was not competent by way of exception. Durie, 13th July 1636, Bishop of Edinburgh *contra* Brown.

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In a removing, this exception was found relevant, That the party was infest upon a comprising; and the Lords refused to oblige the defender to produce the comprising, to dispute its sufficiency *boc loco*, tho' it was alleged to be led for an heritable sum, not made moveable by requisition or otherwise. Durie, 11th December 1623, Cunningham *contra* Austin. In possessory actions, replies against the defender's right reserved till reduction.

A PARTY producing an instrument of requisition, and the other party offering to prove directly the contrary of what was therein insert, and that by another instrument under the same notar's hand; the Lords refused to admit the same, and only reserved action of improbation. Colvil, February 1583, Earl of Crawford *contra* Ogilvie. Exceptions against legal instruments.

FOUND that no alledgeance, plainly contrary to the execution of a messenger at arms, can be admitted, unless the party offer to improve the execution. Colvil, February 1581, Lady Kilsyth *contra* Ld. Wedderburn. ---- A poinder pursuing one who had meddled with some of the poinded goods; and the defender, at advising the cause, having offered to improve the poinding *in data*; the Lords repelled the defence *boc statu*, reserving action, in respect the poinding was produced *ab initio*, notwithstanding it was alledged, That the Defence was *noviter veniens ad notitiam*. Dirleton, 4th June 1667, Zinzian *contra* Kinloch. Messenger's execution.

AN apparent heir proponing improbation against a bond, for payment of which he was pursued; it was found that it could not be received *boc loco*, the writ being registred, but action of improbation was reserved. Durie, 24th November 1632, Annan *contra* Annan. Durie, 16th February 1633, Ker *contra* Ker. Durie, ult. March 1637, Veitch *contra* M'Dougal. ---- The Lords refused to hear a party propose improbation of a decreet-arbitral by way of suspension, tho' he offered to improve the same by the oaths of the judges, who were both present. Hope, (*Arbitration*) 21st December 1614, Monteith *contra* Carmichael. ---- John Home being charged upon a bond of L. 37 Scots, suspended, and offered to improve the bond, as not subscribed by him, but another John Home. It was answered, Improbation is not receivable but in a reduction, or where the original writ is produced; but *ita est*, this bond is registred in an inferior court, and the charger is not obliged to produce, nor is the clerk of the inferior court called. The Lords, in respect the matter was of small importance, admitted the reason of improbation, the suspender consigning principal sum and annualrent, and declared they would modify a great penalty in case he succumbed, and ordained letters to be directed against the clerk of the inferior court to produce the principal. Stair, 16th November 1665, Dickson *contra* Home. Improbation how proportionable.

METUS may be proponed, not only by way of exception, but reply, and that against a third party, possessor of the thing extorted, but *qui metum non intulit*, seeing it is *actio in rem scripta*. Colvil, June 1591, Forbes of Monimusk *contra* tenants. Sinclair, December 1543, tenants of Cockburnspath *contra* Lord Home. Maitland, 17th March 1554, Oliphant *contra* Lady Bochtie. *Vis & metus*

Exception against a bond granted by a woman *vestita viro*.

AN exception against a woman's bond, that it was granted in her widowhood, but after proclamation of her banns with a second husband, was found relevant, and received summarily, without necessity of reduction. Durie, 29th January 1633, *Scot contra Brown*.

Irritancy how proportionable.

FOUND that a back-tack set with a clause irritant of two years, running in the third, could not be taken away by exception, but behaved to abide a declarator. Spotiswood, (*Tack*) 29th January 1629 Stevenson *contra* Barclay. --- But thereafter, in the like case, the Lords repelled the defence, and found the pursuit of removing equivalent to a declarator; but this was because the defender never offered to purge the bygone failzie by payment of all that was due. Spotiswood, (*Tack*) 29th June 1631, Boswell *contra* tenants. --- An heir of tailzie having contracted debt, and thereby incurred the irritancies of the tailzie, the next heir insisted in a declarator, that he had thereby lost his right of property, and that all the bonds contracted by him and apprised upon, were null *quoad* these lands. The creditors alledged no process, to annul their bonds and apprisings, *boc ordine*, by way of declarator, but the pursuer must, *via ordinaria*, reduce, in which case, the creditors will have terms granted them to produce the writs called for. The summons was sustained, in respect there was no bond craved to be produced, or simply reduced, but only that any bonds granted to the defenders since the tailzie, are null *quoad* the tailzied lands. Stair, 21st January 1662, Ld. Balvaird *contra* creditors of Annandale. One disposed a tenement to his daughter and son-in-law, taking them bound to pay him a certain sum, *wherein if they failzie, the said disposition to expire ipso facto*; the disposition was apprised from the disponees, and the appriser pursuing the disponent for mails and duties, he alledged, that he ought to have the sum that he had stipulated to himself in the disposition. It was answered, That the appriser was not bound to pay that sum, all the disponent could do was to proceed upon the clause irritant by way of declarator, and in the mean time the appriser must have the mails and duties. The Lords finding the cause so favourable, a person disposing to his own daughter and son-in-law, and the disponent yet in possession, did, without multiplying processes, sustain the declarator by exception. Stair, 7th November 1666, Canham *contra* Adamson. --- A tenant being pursued to remove upon a warning, excepted upon a standing tack; the pursuer replied, That more than three terms of the tack-duty were resting, so that the defender must either remove, or find caution to pay the bygones. This was not found competent by way of reply, since the tack was still a subsisting right; but the Lords declared, that if the pursuer would add that member to his libel, they would sustain it, without putting him to a new process. Stair, 16th December 1671, Blair *contra* Brown.

Deed by a minor without consent of his curators.

A MINOR was allowed to propone by way of exception, that he, having curators, had entred to his predecessor without their consent, altho' he qualified no lesion thereby sustained. Durie, Auchinleck, (*Air*) Spotiswood, (*Heir*) 16th February 1627, Simpson *contra* Ld. Balgony. The contrary formerly found. Durie, 7th December 1621, Clark *contra* Ld. Balgony. --- A bond granted by a minor without his curators consent, was found challengeable by way of suspension. Auchinleck, (*Minor*) 9th July 1628, Viscount Stormount *contra* Ld. Drum.

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— The Lords found minority and lesion proponed by one, who, at granting the writ in controversy, was in *familia paterna*, receivable in a suspension, without necessity of a reduction. Durie, 29th June 1637; *Ld. Lamond contra Murray*. — A cautioner being charged upon a liquid bond, it was found competent by exception, that his subscribing as cautioner was null, being without his curators consent. Stair, 22d December 1665, *Lesly contra Sinclair*. Haddington, 24th January 1611, *Moncrief contra Craig*.

A CHARTER having been granted to a vassal, during the superior's minority, and this deed revoked in due time; yet, the vassal pursuing afterwards for a sasine upon his charter, the Lords found the defence of minority and revocation not relevant *hoc loco*, and that the charter ought to stand till it be reduced. Maitland, 5th February 1566, *Currie contra Ld. of Glenbervie*. — A minor pursuing for the mails of a tenement, and it being excepted, That the said tenement was redeemed, and a renunciation granted by his tutor; the minor's reply, That no declarator of redemption was obtained, and that himself was lesed (because the price was not employed to his utility); found not receivable *hoc loco*, but that it behoved to be libelled. Haddington, 6th February 1606, *Cockburn contra Wood*. — The Lords received minority and lesion, by way of exception, the sum in question being only L. 80 Scots. Achinleck, (*Minor*) 27th January 1632, *Taylor contra Hart*. — Minority and lesion is not competent by way of suspension or exception, but by way of action and reduction. Stair, 28th June 1665, *Keil contra Seaton*.

In a pursuit against an heir, for payment of an holograph-bond, death-bed was found not competent by way of exception, but by reduction. Stair, 11th January 1666, *Seaton contra Dundas*. The contrary found, and the objection sustained by way of exception. Gofford, 14th November 1668, *Calderwood contra Schaw*.

INHIBITION cannot be used by exception or reply, but only by way of reduction. Stair, 23d July 1674, *Johnston contra Johnston*.

THE Lords refused to receive interdiction by way of exception or reply, but allowed the proposer to reduce. Durie, Spotiswood and Achinleck (*Executors*) 17th March 1630, *Semple contra M' Neish*. Stair, 20th June 1671, *Crawford contra Haliburton*. Interdiction proponed in a suspension, was refused to be sustained, altho' the said interdiction was known to the charger, in respect of the bond standing unreduced; but the Lords suspended execution of the charge to a certain day assigned to the suspender to do diligence, to obtain his reduction discussed. Durie, 22d January 1631, *Hardy contra M' Aulay*. — But interdiction may be proponed by way of reply, which delays not the pursuer. Stair, 13th February 1662, *Lockhart contra Kennedy*.

FOUND, That exhausting may be proponed for an executor by way of exception, altho' he have no decret of exoneration. Colvil, *Ld. Broughton contra Aikman*. — An executor alledging exhausted, and the reply being made, That he had intromitted with as much as would

pay the pursuer, not given up in the testament, which the pursuer referred to his oath. The Lords sustained the reply, it being referred to his oath, and found no necessity to put the pursuer to take a dative *ad omissa*, but sustained the trial thereof, in this same process, to be proven. Durie, 24th January 1639, Inglis *contra* Bell.

Turpis causa.

IN a reduction of a bond, at the instance of the granter's heir against the creditor, this reason for reducing was repelled, *viz.* That the name of the creditor was only borrowed to the behoof of a *pellex* of the defunct's, he having been married at the time, and that so the bond was granted *ob turpem causam*; for the Lords found, That this reduction, tending to the trial of adultery, was prejudicial, and in effect a precognition to a criminal pursuit, which might be moved against the woman; and if it were moved before the justice-court, this present action might be a probation there, whereby her life might be in hazard; and therefore repelled the reason of the alledged turpitude, till the same should be tried before some ordinary and competent judge. Durie, 18th February 1624, Fern *contra* captain Wishart's heir.

Proof of tenor, if competent by way of defence.

IN an improbation of the grounds and warrants of an inhibition *in re antiqua*, the party throwing in a summons of proving the tenor, because he had only produced extracts, which did not satisfy the production; and therefore certification being craved, in regard, that certification in an improbation was not to be stopt on such pretences; the Lords thought it hard to hinder the defender to prove the tenor *hoc loco*, tho' he had been long in raising it, and, on the other hand, it was unreasonable to delay the pursuer of the improbation; therefore they declared, They would receive the tenor *incidenter* in this same process, and hear them summarily upon the relevancy of the adminicles, without further delay. Fountainhall, 12th June 1701, Mein *contra* Duns.

What exceptions competent against a proving of the tenor.

IT being objected against the proving of the tenor of a writ, That it was innovat and extinguished; the Lords repelled the objection *hoc loco*, reserving to the defender to be heard thereon in any action to be raised upon the decret of tenor, in case it should be obtained. Forbes, 7th July 1713, creditors of Orbistoun *contra* Hamilton of Dalziel. The like. Fountainhall, 26th June 1712, Inglis *contra* Lord Alexander Hay.

Exceptions it is proponable in *curfu diligencia*.

AN obligation was transferred *passive*, against both heirs of line and tailzie, reserving the benefit of discussion and other questions *contra executionem*, Haddington, 19th February 1611, *contra*. In transferring of a bond against a person as heir to his father, it being alledged, That the pursuer had comprised certain lands and tiends for the same debt, and was in possession of some of the tiends comprised; the alledgeance against the transferring was sustained, altho' it was answered, That it was only competent against the execution, but not in a transferring. Spotswood (*Transference*) 16th July 1633, Lawson *contra* Scot of Whittleid. --- In a pursuit against a pupil charged to enter heir, to pay a debt of his father's, appeared another creditor of the defunct's, alledging, That he would not suffer his debtor's estate to be affected to his prejudice, and offered to prove, That the debt pursued on was satisfied. This defence was not found competent *hoc statu*, because

cause it might delay the pursuer, and postpone him to other creditors ; but the Lords declared, That it should be receivable against the pursuer; whenever he should pursue for affecting any of the defunct's means or estate. Stair, 24th July 1662, *Shed contra Gordon and Hill*. --- An exhibition *ad deliberandum*, pursued by an apparent heir, was sustained, notwithstanding, the defender offered to prove behaviour, unless the defence were instantly verified ; for the Lords will not allow a course of probation to stop an action of this nature. Stair, 3d February 1673, *Riddoch contra Stewart*. --- An objection being made against the service of a man to one of his predecessors dead fifty years before ; the alledgeance, That the predecessor was bastard, was found not sufficient to stop the service, and found, That the exception of bastardy, which by act 94, Parl. 1503, is ordained to be received against a service, ought to be understood of the bastardy of the procurer of the brief, and not of the predecessor, specially in cases of antiquity as here; otherwise it might be a way to stop all services. Durie, 15th January 1629, *Ld. Corbie contra Schaw*. --- In a general declarator of bastardy, it being objected, That the defunct had obtained a legitimation from the king ; it was answered, That legitimation what effect it may have, cannot be disputed in the general declarator, but must be reserved to the special ; which was found relevant. Stair, 19th February 1669, king's advocate *contra Craw*. --- A disposition of lands being granted without procuratory or precept ; In a process against the heirs of the granter, for fulfilling the obligation contained in the said disposition, to grant procuratory and precept ; the defence, That the deed was granted on death-bed, was found not competent *in hoc statu*, but reserved till reduction. Home, November 1685; *Nisbet contra Smiths*.

THE Lords preferred a publick infeftment, tho' posterior to a private one clothed with possession, because that which was publick proceeded upon a contract of marriage, and inhibition executed thereupon before the other was infeft and had attained possession ; and this was sustained by way of exception in a pointing of the ground, at the instance of the private infester, without any necessity found for the inhibitor to reduce. Durie, 3d March 1626, *Law contra Lady Balgony*. --- In an action for mails and duties, two comprisers competing, who were both infeft, but neither had attained possession, the Lords sustained a nullity proponed by the one against the other's comprising, by way of exception. Durie, 26th July 1628, *Mitchelson contra Ker*. --- In a competition about the mails and duties betwixt a singular successor in a wadset right, and the reverser, it was not found competent by way of exception, but by action of declarator, that the wadset was satisfied and extinct by intromission, it not being founded upon any article in the contract of wadset, but upon an unwarrantable intromission of the pursuer's author. Stair, 29th November 1671, *Justice contra Boyd*. --- In a competition betwixt two creditors on an estate, the one founding on a base infeftment of ward-lands, and the other repeating a declarator of recognition he had against him on that head ; the Lords received the declarator, even *hoc ordine*. Fountainhall, 17th March 1685, *Forbes contra Thoirs*.

In a competition, every alledgeance receivable by way of exception, without necessity of reduction.

WHAT allégeances proponable against a process of adjudication. See *Adjudication*.

OBJECTIONS competent to one party and not to another. See *Jus tertii*.

COMPETITION.

Arresters
with poinders.

ARRESTMENT does not bar other creditors to carry off the goods by poinding. Haddington, 5th June 1611, Wright *contra* Thomson. Durie, 11th March 1635, Dick *contra* Spence. Durie, 12th February 1636, Leslie *contra* Noon. Stair, 4th December 1679, Forrester *contra* tackfman of excise. Durie, 29th July 1634, Hunter *contra* Dick.--- And even an inchoat poinding, which was stopp'd without any fault of the creditor, was found to give a preference in competition with an arrestment first completed by a decret of furthcoming. 13th February 1736, Muirhead *contra* Corrie.

Arresters
with assignies.

ARRESTMENT upon a dependence, with sentence following, found preferable to an assignation intimate after the arrestment, tho' before sentence. Hope, (*Arrestment*) 16th June 1618.---But an assignation, tho' intimate after the arrestment, was preferred, the arrestment being upon a dependence, and no decret as yet recovered against the common debtor. Durie, 6th December 1638, Douglass *contra* Mitchel.--- An assignation, intimated before arrestment, is preferable. Durie, 22d June 1642, Nisbet *contra* Williamson, &c.--- An arrestment, and the intimation of an assignation being made in one day, the Lords brought them in *pari passu*, and divided the sum betwixt them. Spotiswood, (*Creditor*) 28th January 1630, Inglis *contra* Edwards.--- In a competition betwixt an assigney and an arrester, the Lords preferred the arrester, whose execution bore to be two hours before what the intimation bore. Durie, 30th January 1629, Davidson *contra* Balcànquhel.---An arrestment and the intimation of an assignation being on the same day, only the intimation mentioning the hour, and the common debtor having declared under his hand, That the arrestment was two hours prior to it, the Lords ordained them to come in *pari passu*. Home, July 1687, Addie *contra* Scrimzeour.

Arrester
with annual-
renter, insist-
ing in a perso-
nal action.

ARRESTMENT having been laid in a tenant's hands, in a process of furthcoming, raised against him after he was removed from the lands, an annualrenter appeared who had a poinding of the ground, and insisted to be preferred; the Lords found, That the annualrenter having done prior diligence, whereby he might have poinded the tenant before he removed, albeit he did prejudice himself of all execution against the tenant's goods after they were off the ground; yet *quoad* the duties payable to the master, for which he might pursue him *personali actione*, he was not prejudged thereof by the tenant's removal; but the decret of poinding the ground and letters thereof, being a real execution prior

to

to the arrestment, made him preferable to the arrester. Gosford, 1st February 1670, Wilson *contra* Ruffel.

AN arrester of the mails and duties was preferred to another creditor who had a disposition of the lands for security of his debt, but without <sup>Arresters with dispos-
nees.</sup> sasine, without possession, unless by holding of courts, and without being assigned to the mails and duties. Durie, 24th June 1642, L. Forrester *contra* Castlelaw. ----- An arrester was preferred to a wadset-ter, because his sasine, which was the only ground of complete real right to the lands, was after the arrestment. Durie, 22d November 1633, Warnock *contra* Anderson.

AN arrestment of farms cannot be of force, being made before Martinmas, if, *medio tempore*, the lands be comprised, and the compriser infest before the term. Hope, (*Arrestment*) 2d December 1628, Cumming *contra* Cumming. Durie, 13th December 1628, Huntly *contra* Home. Arrestment laid on *currente termino*, affects the next ensuing term's rent, and was preferred to an apprising deduced also before the term, tho' after the arrestment, whereupon infestment followed after the term. Stair, 2d July 1667, Lister *contra* Ayton. --- A decret of apprising as to mails and duties, is a complete diligence, being a legal assignation needing no intimation, after which there is no place for *mora*: Upon which footing, an appriser of an infestment of annualrent was preferred to a posterior arrester of the bygone annual-rents, tho' the competition was nine years after decret, and he had done no diligence all that time. Stair, 23d February 1671, Lord Justice clerk *contra* Fairholm. It was formerly otherwise decided. Durie, 14th February 1623, Ld. Saltcotes *contra* Brown. --- A compriser infest, preferred to a subsequent arrester, altho' he had suffered the debtor to retain possession of the lands for many years after his comprising and infestment, which was urged as a presumption of simulation or dereliction of his diligence. Durie, 13th December 1627, tenants of Dryop *contra* sheriff of Forrest. ----- In a competition betwixt an adjudger and arrester, the subject being an heritable bond, the citation on the adjudication being prior to the arrestment, and the decret of adjudication also prior to that of furthcoming, the Lords preferred the adjudger. Dalrymple, Forbes, 26th June 1705, Stewart *contra* Stewart. ----- In a competition betwixt two creditors of a defunct, about the rents of the estate falling due after the debtor's death, both having obtained decreets of constitution against the apparent heir; the one upon an arrestment, laid on in the tenants hands as debtors to the apparent heir, obtained furthcoming; the other upon a charge to enter heir, obtained adjudication some months thereafter; the Lords preferred the arrester, tho' it was urged, That an apparent heir has no proper title to the rents, and that they cannot be made furthcoming for his debt. 8th January 1724, Syme *contra* Dalziel.

AN arrester pursuing furthcoming, after the common debtor's decease, was preferred to an executor-creditor of the defunct who had confirmed the debt arrested, as *in bonis defuncti*, and had even gone so far as to obtain decret against the debtor in whose hands the arrestment was laid. Stair, 20th January 1681, Riddel *contra* Maxwell. The like found. Marcus (*Arrestment*) February 1688,

contra .---- An arrestment laid on before the common debtor's death, with a decret of furthcoming obtained after his death, preferred to an executor-creditor, who was indeed confirmed before the decret of furthcoming, but had not eiked the subject in controversy till after. Marcus, (*Arrestment*) 29th June 1688, Ruffel *contra* Lady Balencrief. ---- In a competition betwixt an arrester upon a dependence, and another creditor, who, after the common debtor's death, confirmed the arrested subject as executor-creditor; the Lords preferred the executor-creditor *hoc statu*, he finding caution to make the sums furthcoming to the arrester, in case the arrester's claim should be purified. 20th July 1732, Crawford *contra* Simpson.

Assignies
with executors
creditors.

AN assigney neglecting to intimate during the cedent's life, an executor-creditor of the defunct's confirming the subject as still in *bonis defuncti*; it was found to be a valid confirmation, and preferable to the posterior intimation of the assigney. Home, 5th July 1726, Sinclair *contra* Sinclair. The contrary found. Stair, Gosford, 27th July 1669, executors of Redpath *contra* Home.

General assigney
with creditors.

A GENERAL assignation of moveables, with a power to intromet and enter to possession immediately upon the granter's decease, tho' possession be apprehended accordingly, is not sustained in our law as a transmission of the property, but these goods must be confirmed; and without confirmation, the disposition, tho' clothed with possession, will found no better right than a *jus crediti* for the value. The reason is, that the power to apprehend possession is a procuratory, *quod perit morte mandantis*, as procuratories did with regard to land-rights before the act of parliament; and if confirmation be necessary, the assigney can stand upon no better footing than any other creditor. Thus an assignation, in a contract of marriage, to the wife, of the whole household-plenishing that should belong to the husband the time of his decease, was found only to make the wife creditor for the value upon the implied warrandice, so as to bring her in *pari passu* with other creditors confirming within six months; but she was found to have no preference, tho' she got into the natural possession after her husband's decease, and also confirmed the subject prior to any step of diligence by the creditors. July 1732, children of the deceased Lord Kimmerghame *contra* his creditors. The like. Forbes MS. 26th November 1713, Borthwick *contra* Wood. ---- And, in a general assignation to the wife of heretable and moveable subjects, intimate, after the husband's decease, to a debtor, from whom she uplifted several years annualrents of an heretable bond; the Lords preferred an adjudication deduced after intimation, in respect the general assignation was not confirmed. July 1724, Stirling *contra* Laurie. ---- Yet a disposition by a husband to his wife of his moveables upon the mains of Auchinvill, was found sufficient to defend the relict in her possession of these moveables against an executor-creditor pursuing for the same. Stair, 3d July 1663, Gordon *contra* Frazer.

Assignies
with comprisers.

ASSIGNATION intimate, preferred to a posterior comprising, altho' the denunciation was made before intimation of the assignation, because a denunciation does not affect the sum, nor make it so real, but that

that the assigney may effectually perfect his intimation thereafter. Durie, 2d March 1637, Smith *contra* Hepburn and Barclay.

ASSIGNATION out of the first and readiest of the tiends of several lands in security and payment of a debt, was not found good against a posterior apprising of the lands and tiends. Stair, 6th February 1666, Watson *contra* Fleming. --- A compriser of lands and tiends, in a competition of mails and duties, preferred to an anterior assigney, who had not apprehended possession before the sasine upon the comprising, but had only intimate his assignation after the comprising, and before the sasine. Haddington, 17th December 1622, Hamilton *contra* Alexander. --- The cedent continuing still proprietor of the Lands, notwithstanding of assignation to the mails and duties, must have a power of alienation; and of consequence the purchaser, who has right to the lands, must of necessary consequence have right to the produce of the lands; therefore it is, that the assigney's right to mails and duties, which is only a personal claim against possessors, and no real right in the lands, must fall so soon as the cedent is denuded by infestment. Durie, 13th December 1628, Huntly *contra* Home. --- A factory to a creditor to uplift rents till he should be paid, not good against a singular successor in the lands. Spotiswood, (*Factor*) 17th July 1632, Lady Borthwick *contra* tenants of Catkune. --- A tack being set by an heir, and therein the tack-duty appointed yearly to be paid, not to himself but to one of his creditors, by virtue whereof the said creditor was in possession, the Lords preferred this creditor to a posterior compriser not infest. Durie, 13th February 1627, Samuel *contra* Samuel. --- A tack being set with this express clause, That the duty should be yearly paid to such and such creditors of the setter *nominatim*; and another creditor having thereafter comprised the lands, the Lords preferred the compriser to the creditors, seeing, the setter being denuded by infestment upon the comprising, the duty behoved to belong to the compriser in consequence of his real right. Spotiswood, (*Comprising*) 27th; Durie, 28th November 1635, Morison *contra* tenants of Orchardtown. --- A proprietor of an entail'd estate having granted to a creditor assignation of mails and duties, the assignation, after the granter's decease, was found effectual against the heir; for tho' he did not represent the defunct with respect to the debt in question contracted contrary to the entail, yet, the entail not being recorded, the debt might be made effectual against the estate by adjudication, and therefore the heir could have no just interest to quarrel the form of the conveyance. November 1732, Baillie *contra* Earl of March. --- The Lords found an adjudication *contra hereditatem jacentem* preferable to an assignation of mails and duties granted by the defunct proprietor, where the competition was about the rents that fell due betwixt the proprietor's death and the date of the adjudication. 12th January 1734, Earls of Loudon and Glasgow *contra* Lord Ross. --- A tacksmen of tiends having assigned the tiend-sheaves, payable by the heritors, in security and payment of a debt; this was only found a personal right, tho' cled with possession, and was not sustained to compete with a posterior assigney to the tack itself, a tack being a real right. Durie, 27th March 1628, Lord Blantyre *contra* parishioners of Bothwell. --- A woman having granted bond for a sum, payable the first term of Whitsunday or Martinmas after her death, at the same time assigning the creditor, for his security,

Assignation
to mails and
duties with
other rights;

ty, to as much of the readiest of the rents due by her tenants at her decease, as should pay the same; and having thereafter married, in a competition after her death, betwixt the husband and creditor, the husband contended these rents belonged to him *jure mariti*, as the first completed right, requiring no intimation. Answered, Tho' the husband's right be in its nature preferable, yet, as he is liable for his wife's debts after dissolution of the marriage, *quatenus locupletior*, there lies a personal objection against him from competing, unless he will pay the debt. The Lords preferred the creditor. Gilmour, 25th January 1662, Cunningham *contra* tenants of Poinont.

Apprisings
with voluntary
rights.

An heritable bond before denunciation in a comprising, tho' the infestment was posterior thereto, was preferred, being before infestment upon the comprising. Hope, (*Apprising*) 16th June 1612, Henderfon *contra* M'Adam.---The like of an infestment upon resignation, which resignation preceeded the denunciation. Hope, (*Apprising*) 22d March 1622, Hope *contra* Anderson.---The like, Durie, 11th July 1637, Robertson *contra* Brown.---In a competition betwixt an apprising and a voluntary disposition; the Lords, in respect that the disposition was prior to the denunciation of the apprising, preferred the voluntary right completed by confirmation of the superior, altho' posterior to the charge upon the comprising, in regard the charge was only to be considered in the competition of diligences among themselves, but not with voluntary rights. Home, December 1682, Falconer, 10th March 1683, Aikenhead *contra* Nisbet. July 1728, Mair *contra* Ballantine.---The like, Home, 26th February 1724, Stirling *contra* creditors of Ballagan, in the case of an infestment of annualrent.---A disposition of the same date with the denunciation, but with the first infestment, was preferred to the apprising. Spotiswood, (*Comprising*) 31st January 1628, Hamilton *contra* Brown,---An infestment of annualrent being after the first apprising, but before the second, all three were brought in *pari passu*, being within year and day, the statute being new and dubious. Stair, 6th February 1673, Brown *contra* Nicholas.

Liferents
with other
debts.

AN executor-creditor for a liferent annuity, being, within six months of the common debtor's decease, pursued by another creditor for payment of a debt due to him; the Lords found, That the inventory of the testament ought to be divided proportionally betwixt them as follows, *viz.* The liferenter to be reckoned as a creditor in a principal sum answerable to her liferent-annuity, and the other creditor in the debt resting to him at the time of the confirmation, and the inventory to be divided betwixt them in that proportion: Next they found, That the share of the inventory thus falling to the liferentrix, must be considered as a stock, of which she is to have the use during her life, but that she must find caution to make the same furthcoming at her decease, to be divided betwixt her representatives and the other creditors, in proportion to what is yet resting of their respective debts, her claim being the inlacks of the jointure, after giving allowance of the annualrent of her share of the inventory, and the other creditor's claim being what remains due to him, after giving allowance of his share of the inventory, with annualrent of the balance. Dalrymple, 3d, Forbes, MS. 4th December 1713, Colonel Erskine *contra* Aikenhead.

IN

IN a competition betwixt charters of resignation and confirmation Charters of resignation and confirmation. past in exchequer, and seal'd the same day, the charter of confirmation is preferable to the charter of resignation, the former being complete by sealing, and the latter incomplete till sasine thereon. Marcus (*Infeftment*) *contra* Lady Mary Kennedy.

THE Lord Renton pursuing for the casualties of the office of for- Infeftment upon resignation, with other rights. restry of the abbacy of Coldingham against the feuars of the said abbacy, the defenders produced their old charters burdened with no such casualties; the pursuer produced a charter of resignation with sasine, containing the forrestry, flowing from the abbot of Coldingham, prior to any of the defenders infeftments; but then it was answered for the feuars, That a charter of resignation confers no more right than the resigner had, and therefore, unless the original infeftment be produced, the charter upon resignation can signify nothing; the Lords sustained the pursuer's title being *in re antiqua*. Stair, 17th January 1666, Lord Renton *contra* feuars of Coldingham.

The common author, whose right to his lands was a disposition with Betwixt singular successors, where the common author is not infeft. procuratory and precept without infeftment, granted first infeftment of annualrent, and thereafter disposed the lands irredeemably to another, and conveyed his procuratory, upon which the purchaser was duly infeft: In a competition the annualrenter pled, That the common author was *funditus* denuded of his personal right to the lands, by granting the heritable bond, which implied a conveyance of his disposition, to the extent of the sum in the heritable bond, after which the second disposition was *a non habente potestatem*; the Lords found, That an assignation to an incomplete real right, tho' it had been directly done and intimate, has no effect against another singular successor completing his right by infeftment. Stair, 20th June 1676, Brown *contra* Smith.--- A naked disposition of lands was found to denude the granter *funditus*, who had no more himself than a disposition with procuratory and precept, so that nothing remained with him thereafter to be carried by a legal or voluntary conveyance: Upon which footing the disponent was preferred to a posterior appriiser, whose apprising was led against the common author, tho' the appriiser had gone on to complete his right, by obtaining infeftment upon the procuratory contain'd in his debtor's disposition. Forbes, 8th December 1710, Rule *contra* Purdie.--- The like, 20th November 1733, Sinclair *contra* Sinclair.--- Upon the same footing the first disponent was preferred to the second disponent first infeft. Forbes, 19th December 1710, Colonel Erskine *contra* Sir George Hamilton.--- But thereafter, in a similar case, the Lords laying aside all specialities, took up the question in the abstract, and having first pronounced an interlocutor in favours of the personal right, being the first conveyance, led by the weight of former decisions, they, upon petition and answers, a hearing in presence and informations, preferred the second conveyance, being an adjudication, in respect infeftment was expedite upon the same, the other remaining still personal, and refused a reclaiming petition without answers. 22d June 1737, Bell of Blackwoodhouse *contra* Gartshore.

IN a competition of rights flowing from different authors, the eldest Betwixt rights flowing from different authors. was preferred, tho' *in petitorio*, the other being in possession. Stair, 7th

7th February 1667, Smeton *contra* Talbert. ---- In a competition betwixt two base infeftments flowing from different authors, the Lords preferred that right which was in possession, tho' the right upon which the process was founded was of an older date, and refused to sustain the reduction without a progress from the king, or a common author, or prescription; for the defender argued, That he being in possession, and producing any infeftment as a title, it cannot be taken away but by a prior complete right. Stair, 16th June 1674, Brown *contra* Innerwick.

Annualrenters, adjudgers, inhibitors, &c.

THERE being a set of adjudgers ranked *pari passu*, some of them struck at by inhibition; yet it was found that the inhibition could have no effect, in respect the other adjudications were more than sufficient to exhaust the subject, with whom the inhibitor, who had not adjudged, could not come in *pari passu*, tho' he should adjudge, it being more than year and day since the first effectual adjudication, and therefore he could have no interest to reduce, seeing he could make no benefit by his reduction.

15th February 1698, Miln of Carriden *contra* creditors of Nicolson. ---- There being three sorts of creditors on a bankrupt estate, some who had inhibited and adjudged, others who had only adjudged, but for debts prior to the inhibitions; a third sort who had got voluntary rights and infeftments of annualrent, but posterior to the inhibitions; the inhibitors having obtain'd decreet of reduction against these annualrenters, and they being thus out of the field; and the inhibitors contending, that they must come in place of the annualrenters, and draw the share that belonged to them, and for what remained of the estate, the annualrenters must affect the same, before the adjudgers could get any thing, and so, *si vinco te vincentem, &c.* the vote being stated, Whether a creditor-inhibitor was only to be preferred so far, allenary, as he would have been in case no posterior annualrenters had interveened, or if he, upon reducing the infeftment of annualrent, must be ranked in his place, and draw accordingly, until his inhibiting debt was satisfied and paid? It carried, That he should only draw a share, so far as the annualrenter prejudged him, and as if the annualrent had never existed, but not to have the annualrenter's full sum. Fountainhall, Dalrymple, Forbes, 20th January 1709, creditors of Langtoun competing. ---- In a ranking there was first a prior and preferable annualrenter, secondly, a set of adjudgers coming in *pari passu*, of which one had an inhibition that struck at the annualrent-right; the annualrenter was ranked *primo loco*, and the inhibiting adjudger was allowed to draw out of the annualrenter's share to make up what she would have drawn had the annualrenter not been in the field; but then the dispute arose, Can the annualrenter recur against the other adjudgers for any share of what is drawn from him by the inhibition? The adjudgers argued, That he could not, because the inhibition is directed against the annualrenter only, making a personal challenge against his right, which the adjudgers are not concerned with; it can make no variation upon their case, whether there be an inhibition or not, and to allow the annualrenter to recur, is, in plain English, making the inhibition strike ultimately against them, whereas, *ex concessis*, it strikes only against the annualrenter. The Lords found, That the annualrenter being ranked, so as to draw his share, in competition with the other creditors, he could not recur against the adjudgers

the adjudgers, for any part of what was drawn from him by the inhibition. February 1730, Campbell *contra* Drummond.

COMPETITION, *porteurs of bills with other creditors. See Bill of Exchange.*

———— Donatars of *escheat* with creditors. *See Escheat.*

———— Disposition with a posterior gratuitous disposition of the same subject clothed with *infestment*. *See Bankrupt.*

———— Base *infestment*, with other rights. *See Base Infestment.*

———— Tacks, with other rights. *See Tacks.*

CONCURSUS ACTIONUM.

THE deed of contravention, being ejection out of a house, the party has his election, whether to insist in an action of ejection on or contravention; for the Lords found, where a party has two actions upon the same fact, he may choose either, but if both tend to the same end, whether *ad pœnam* or reparation, choosing the one opposes the other. Durie, 19th February 1630, Hiddleston *contra* Maxwell. Fountainhall, 8th January 1712, Heriot *contra* Hamilton and others. — And in a like case, where the party had made his election, and taken a decret of violent profits upon ejection, the Lords refused to sustain contravention, and that altho' the pursuer was content to renounce his decret of violent profits, Hope, (*Contravention*) Haddington, 13th December 1610, Johnston *contra* Charteris. Haddington, 29th November 1611, Hepburn *contra* Arkettel. — A party having either stolen or found some bank-notes belonging to another, who having first taken a precognition, by getting a servant examined before a magistrate, and next procuring a warrant from the Lord Advocate to secure the party till he should find caution, which accordingly he did, and whereby the pursuer seem'd to have made his election of the criminal process; yet the Lords, when the pursuer came to insist before them *ad civilem effectum*, repelled these dilators, and sustained the process *ad civilem effectum* to make up the pursuer's loss. Forbes, 15th, Fountainhall, 16th February 1712, Buchanan *contra* Menzies. — The Lords sustained a contravention, altho' the magistrates of the place (both parties being burgers) had immediately committed the party to prison for the fact; and this, because no satisfaction was decerned by the magistrates to be given to the complainer. Durie, 26th March 1623, Fithie *contra* Carmichael.

Where different actions arise upon the same fact, tending to the same end, the pursuer cannot insist upon both.

A PARTY intending an action of proving the tenor of a writ, and also another action of exhibition and delivery of the same writ against a third person; the Lords found, That altho' it was *cum diversis personis*, The same where the conclusions are contradictory.

sonis, yet electione unius, tollitur altera, Colvil, June 1590,
Home *contra* Cairncrofs. --- The like, Haddington, 20th December
1592, Guthrie *contra* Guthrie.

But where
the conclusions
are different,
he may insist
upon both

Tho' the party deforced has pursued criminally *ad vindictam publicam* for punishment, he may thereafter pursue civilly for his private interest. Stair, Gosford, 13th December 1672, Murray *contra* French.
--- The like, Durie 25th July 1633, Mitchel *contra* Law and Stewarts. --- The Lords found, That they themselves might take trial of a battery *ad civilem effectum*, that the party who does the wrong should *cadere causa*, but that this did not prejudice a criminal pursuit for the breach of the peace. Gosford, ult. January 1673, Swinton *contra* Slich. --- The like, Fountainhall, 15th June 1711, Scot *contra* Carle.

After a fine
for contumacy,
the judge
cannot fine a
second time
for the delict.

AN inferior judge having both fined a party accused of a riot for contumacy in not compearing, and likewise cognosced the crime, and fin'd for that also; the Lords found the procedure illegal, because he ought to have followed one of these methods, and not to have used both. Fountainhall, 14th February 1708, Thomson and procurator-fiscal of Dumblain *contra* Wright.

CONDUCTIO INDEBITI.

ACTION of repetition found competent to an assigney against an arrester, whose arrestment was posterior to the intimation of the assignation, but who had obtained payment upon a decret of furthcoming. Durie, 13th January 1629, Finlayson *contra* Kinloch.
--- A debtor who had paid to the obtainer of a decret of furthcoming, and got his discharge, being thereafter decerned at the instance of an assigney, whose assignation had been intimated before the arrestment, pursued the arrester upon the warrandice of his discharge. Alledged for the defender, He could not be liable, seeing *suum recepit*, and the pursuer had not obtruded, as he ought, the anterior intimation of the assignation during the process of furthcoming, which, if he had done, the arrester would have secured himself against the other estate of the common debtor, who now is become bankrupt. The Lords sustained the alledgeance, and assoilzied. Marcus, (*Arrestment*) March 1684, Ker of Chatto *contra* Rutherford. --- *Repetitio nulla est ab eo qui suum recepit, licet ab alio quam vero debitore solutum est*, but an executor-creditor pursuing upon his confirmation, and obtaining payment from the debtor's heir, was decerned to refund, it being afterwards found, that the debt had been paid to the original creditor: For in this case, as the heir was not debtor, neither was the other creditor; for tho' he was creditor in the debt upon which his confirmation proceeded, he was not creditor in the debt in question, which was extinguished by payment before his confirmation, and as to which he could be in no better case than his own debtor, in whose right he came by the confirmation. Stair, Gosford, 10th January 1673, Ramsay *contra* Robertson.

A CREDITOR having assigned the whole sum, after getting payment of a part, and the assigney getting payment of the whole, it was found relevant against a *condictio indebiti* pursued against him; that his assignation was in satisfaction of a debt due to him by the cedent, equivalent to the sum assigned; so that he got no more from the debtor, but what was due to him by the cedent. Stair, 23d February 1681, Earl of Mar *contra* Earl of Callendar.----- An heir having ignorantly paid a debt over again to an assigney, which his predecessor had before paid to the cedent, was found to have no repetition off the assigney, the cedent becoming bankrupt after the second payment. Home, 24th July 1723, Duke of Argyle *contra* representatives of Lord Halcraig.

A SCOTSMAN, who died a foldier in Flanders, having left a sum of money in the hands of his colonel, which a creditor of his uplifted from the colonel, by virtue of an administration in the prerogative court of Canterbury; the Lords found it relevant to assilzie the creditor from repeting the money to executors *qua* creditors, confirmed before the commissaries of Edinburgh, that he got *bona fide* payment before any process or confirmation in Scotland. Forbes, 12th July 1713, creditors of Muirhead *contra* Hamilton.

CONDICTIO indebiti sustain'd to one who paid *errore juris*, 26th July 1733, Stirling of Northwoodside *contra* Earl of Lauderdale.

CONDITION.

THE clause in a contract of marriage, *Si sine liberis*, was found ^{Condition *si sine liberis*.} not to take place where there was a son born, who survived his mother, but died without being served heir; so that in this case the tocher was found not repetable, which it was to have been, if the mother had died without children. Auchinleck, (*Air*) Durie, 27th January 1630, Ld. Colmeslie *contra* Turnbull. Hope, (*Husband*) 16th June 1630, *inter eosdem*. Gosford, 11th January 1677, Baillie *contra* Somervell.----- But where the child was born, and died before the mother, they found, *quod extitit conditio, & casus restitutionis dotis soluta*. Hope, (*Husband*) 1605, Linlithgow *contra* Cairncrofs. Harcus, (*Contracts of Marriage*) 12th July 1688, Smeton *contra* Cushney.----- A provision of conquest to a wife, *in case there be no children of the marriage*, was found not evacuated by the existence of a child, who died the same day it was born. Stair, 27th June 1676, Earl of Dumferling *contra* Earl of Callendar.----- The like where the clause was expressed, *In case the wife depart this life without bairns lawfully procreate of the marriage*; in which case it was found, That the survivancy, and not the existence of children was understood; and therefore that the provision must be effectual, seeing the children procreat died without issue, before their mother. Stair, Fountainhall, 18th June 1680, Oswald *contra* Boyd.----- A wife being impowered in her contract of marriage to dispose of 1000 merks of her tocher, *failing heirs procreate of the marriage*, and there being a child of the marriage, who died before dissolution thereof, the wife disposed of the 1000 merks in

favours of her brother, who pursued for it after her decease; the Lords found, That the procreation and existence of the child, did evacuate the provision, tho' it died before dissolution of the marriage. *Harcus, (Contracts of Marriage)* December 1687, *Ballantine contra Scot.* ---- There being a provision in a contract, That in case the husband died before his wife, leaving children, one or more unprovided and unforisfamiat, then she should restrict her jointure to the half; and one child having survived the father, and died a few months after, the relict was pursued to restrict. Alledged for the defender, The clause of the contract was calculated for a subsistence to the children, who now are dead, and so need none. The Lords found the wife ought to restrict herself to the half. *Fountainhall, Harcus, (Contracts of Marriage)* 22d November 1687, *Robertson contra Binning.* ---- The Earl of Kincardine having granted a bond, for implement of his contract of marriage, for securing 80,000 Guilders on land, in favours of his Lady, in case of no children of the marriage, or, of their dying before the age of twenty, *so as they might, and did dispose of the same*, with a resolute clause making void the infestment, in case of the childrens attaining to that age. The Lords found, That the provision irritating the infestment, was to be strictly interpreted, and that it took effect by any of the childrens attaining to the age of twenty, tho' they did not dispose of the sum; and the Lords would not supply the words, *So as they may, and do dispose*, as an omission, altho' they were mentioned in the narrative, and procuratory, and requisition, and the charter. *Harcus, (Infestment)* 29th November 1681, the Lady Kincardine *contra* the Earl's creditors. ----- A bond being granted by a man to his lawier for a sum payable at the first term after the granter's decease, *providing he died having no heirs-male of his own body*; here it was found, That the heir-male, born of the defunct's daughter, purged not the condition, which was interpreted of sons begotten immediately by the granter himself. *Durie, 2d March 1624, Ld. Curriehill contra* executors of Currie. ---- A wife in her contract of marriage, having accepted a certain sum, for all she could crave by her husband's decease, *in case there were no bairns of the marriage*; the restriction was found not to take place, seeing there was one child who survived the mother. *Gilmour, 31st January, Stair, 17th February 1663, Forsyth contra Paton.* ---- Lands being tailzied to heirs-male by contract of marriage, with a clause therein in favours of the daughters, *That in case there be no heir-male of the marriage, but daughters, in that case, the heir-male and of tailzie, succeeding thereto, shall be bound to pay to the daughters a certain sum*; and there being an heir-male of the marriage, who was served and retoured, and lived many years, yet died before the daughters, whereupon the lands devolved upon the king as *ultimus hæres*. In a pursuit, at the instance of the daughters, against the king's donatary for the said sum, the Lords found, That the condition of the provision for these daughters did fail, and therefore assilzied. *Fountainhall, 25th July 1688, Somervell contra* captain Tennant. ---- A party in his bond of provision among his children, having subjoined a clause, *That in case his whole children deceased without heirs of their body, he obliged himself to pay a certain sum to his wife*; all his children having accordingly deceased, and one of the daughters leaving a male-child, who was never served heir, but died a little after his mother, besides that his uncle, one of the testator's

sons, survived him, and thereafter died childless. In a pursuit upon this bond granted to the relict, against the defunct's next heir, the Lords decided, That the son's surviving his mother, was sufficient to extinguish the bond, seeing, altho' the child was never served heir, yet it could never be said, That the defunct's children died without heirs; and therefore found, That the relict had no right to the sum, and assolizied the defenders. Fountainhall, 8th December 1702, Watt *contra* Forrest. --- A bond being only to subsist, *failing children betwixt the granter and his wife*, was found to be void by existence of children of the marriage, who survived the granter, tho' they died before his wife, without issue. Bruce, 16th February 1715, L. Royston and Fraserdale *contra* Haliburton.

A PERSON having given a bond to a woman for a sum of money, she always marrying with his consent; the Lords decerned him to pay the same, altho' she married without it. Colvil, December 1578, Ld. Cullairny *contra* Ld. St. Monance. Hope, (*Obligation*) 18th July 1617, Kennoway *contra* Campbell. --- In a removing, the exception being upon a tack, and the reply, That the tack had this condition, *That if the defender's daughter married without the pursuer's author's consent, the tack should be null*; the Lords found, That this consent behoved to be express, in order to validate the tack; and that the party's silence at the marriage, and even his living in good correspondence with them for twenty five years thereafter, transacting several bargains with them, &c. was not sufficient to infer his consent. Durie, 16th December 1629, Home *contra* her tenants. --- One having granted bond to his niece, under this condition, *That she should marry with his consent*; the clause was strictly interpreted, he not being *aliundi* bound to provide for her; and it was found, That his subscribing witness to her contract of marriage, or being present at the marriage, did not import such a consent as was required in the condition of the bond, unless it had been specially mentioned and treated upon. Stair, 17th January 1673, Rae *contra* Glasf. --- Marriage being free, the Lords refused to sustain conditions and limitations thereanent adjected to bonds of provision to daughters. Gilmour, 8th January 1663, Gordon *contra* Ld. Lyes. --- A daughter, being already competently provided, the father gave her an additional provision, but which was to become void, if she married without his consent; notwithstanding of the favour of marriage, the Lords found the irritancy incurred, she having married without her father's consent, tho' it was a suitable match. Stair, 13th February 1680, Buchanan *contra* Ld. Buchanan. See Stair, 3d December 1680, Ld. Fettermier *contra* Lord Semple. --- Marriage being free, marrying without the father's consent, was found not to annul a bond of provision by a father to his eldest daughter, "she marrying with his consent, and of those named by him as her curators, otherwise she should only have the sum of blank," which was never filled up; yet the Lords found they might fill it up, if she had transgressed the clause, and thereby restrict the provision according to the match she made; but this nomination not being shown or known to her, the irritancy was found not incurred. Stair, 23d February 1681, Hamilton *contra* Hamilton. --- A party having granted a disposition to his niece, with this provision, *That she should not marry without consent of certain persons therein named, otherwise*

Condition
of marrying
with consent.

wife, the disposition to be null, and the subject to go to others; and she having married without consent of those persons, the Lords, in a process at the instance of the substitutes against her, found it relevant to annul the disposition, that she had contravened the provision; and found the answer relevant, That she required the persons, by whose advice she was appointed to marry, to give their consent, and that they refused to give a reason why they would not consent to the marriage. Home, March 1682, Foord *contra* Foord. --- A daughter being bound up by a disposition, to adhibite the consent of three friends named to her marriage, and she now about to marry a person who was not acceptable to these friends, obtaining a deliverance from the Lords against them to consent to the marriage, otherwise their Lordships would declare her disposition valid without their consent, such clauses being *contra libertatem matrimonii*; and they still forbearing to consent, the Lords found, That she had right to the tocher, notwithstanding that these friends named by the father had not consented to her marriage. Fountainhall, 6th July 1688, Eleis and Dalziel her spouse *contra* Lds. of Scotttarbet, Livingston and Fountainhall. --- The Lords found, That a brother not giving his consent to his sister's marriage, which consent she was bound by her father's appointment to obtain, and under an irritancy of losing part of her portion, which in that case was to belong to the brother, did not infer the irritancy, so as to make the sum belong to him, unless he could give a reason for his dissent. Fountainhall, 20th July 1688, Pringle *contra* Pringle --- A man who by his bond granted to a young woman, in consideration of a sum assigned to him, obliged himself to pay to her such a sum at the next term after her marriage, she always acquainting him therewith, and taking his consent thereto, was found liable to pay the money to the creditor after her marriage, altho' he was not acquainted thereof, in respect she had married regularly with her father's consent, and there was no such quality in the assignation, which was the onerous cause of the bond. Forbes, 20th July 1710, Alison *contra* Duncan, --- A Lady and her husband pursuing her brother for her tocher, contained in a bond of provision, whereto this quality was adjected, *That she should marry with consent of two friends named*, (who nevertheless did dissent) *otherwise the bond to be null*; and the defender only craving, That the nullity might be so far extended, as to restrict the tocher to a moderate provision, correspondent to what would fall to her, as her *legitima*. The Lords, nevertheless, repelled the defence, and found the defender liable in the whole tocher, and refused to modify it. Here the marriage was without disparagement. Fountainhall, Forbes, 7th July 1710, Bunting *contra* Buchannan. --- A man who had given his natural daughter in marriage to one who was nearest of kin to him, and designing to settle his estate on his grand-daughter, the only child of that marriage, and disposing his lands to a boy of his name, and his said grand-daughter, and the heirmales to be procreated betwixt them, and then adjecting the clause, *Who by these presents are destinated and appointed to marry together*; and his said son-in-law, the grand-daughter's father, entring to possess the lands after his death, and the boy pursuing him for the half of the mails, as his aliment in the mean time, and for educating him, &c. Found, That the pursuer could not be debarred from the rents to educate and maintain him, whatever might be done if he should refuse to marry after requisition. Fountainhall, Forbes, 2d January 1712, M'Rath *contra* Alexander.

Alexander. — A wife being substituted by her husband to a provision left to a child in case of the child's death, upon condition, *si vidua manserit & non nupserit*; the Lords found the condition lawful. Gosford, 28th February 1672, *Foulis contra Gilmours*.

A LADY having renounced her jointure, with this provision; *That if it should happen the party in whose favours she had renounced to die without heirs-male of his body, or to have but one daughter; then, and in either case, the renunciation should be null*; the Lords found the renunciation null, upon his dying without any such heir-male, tho' he left several daughters. Forbes, 17th July 1712, *Dame Rachel Nicolson contra Oswald*. — It being provided in a contract of marriage, That the tocher should return to the wife's father, in case his daughter should decease before her husband, within six years after the marriage, leaving no children, and in case her father should have heirs-male within six years after the marriage. The Lords found the condition copulative, and that the tocher should not return, altho' the father had heirs-male within the time above mentioned, seeing the wife left a child, tho' it died within the time. Dirleton, 11th January 1677; *Baillie contra Somervell*.

A GRATUITOUS bond for a sum of money, with this quality, *That it should be null, if the granter were decerned to pay to a third party another sum for which he was then under process*, was found irritated and void by the granter's payment of that other sum, by virtue of a decreet arbitral, upon a submission of the process entred into by him, without consent of the conditional creditor. Forbes, 5th February 1708, *Scot contra Seton*. Unless the conditional creditor could alledge a defence whereupon the debtor might have been assolizied from the depending plea. Forbes, 12th November 1708, *inter eosdem*.

A DAUGHTER pursuing for her provision, which was due to her failing heirs-male of the granter's marriage, was repelled, the father and mother being both alive; tho' the father had even been a long time furious, and the mother past fifty. Stair, Dirleton, Gosford, 21st June 1672, *Carstairs contra Carstairs*.

A BOND bearing a clause, *That it should be void and null, if the creditor died without heirs of his own body, before the sum be uplifted*; and the creditor having so died, but, before his death, having intended pursuit against a third party who had undertaken the burden of all the granter's debts; the Lords found, That the creditor's pursuing, declared sufficiently his purpose and intention to uplift the sum, and being delayed by that third party, the condition was purified; so that it was the same thing as if it had been uplifted. Fountainhall, 20th January 1697; *Ld. of Scotstoun and his Lady contra Drummond of Innermay*.

A PARTY having granted a bond of tailzie, whereby he obliged himself, if he succeeded as heir to his father, to resign in favours of himself, and the heirs of his own body, &c. which failing, to a brother of his, with irritant clauses, *de non contrahendo debitum, et non alienando*, &c. After six years, the granter's father in the granter's contract of marriage, disposes the estate to him, without mention of the

tailzie or irritant clauses, but, on the contrary, containing provisions inconsistent with the same; the Lords, in a declarator at the instance of the substitute, found, That the succession being put in another chanel by the contract of marriage, the tailzie was not obligatory nor effectual now, it being mainly designed in the event of his succeeding as heir, which never existed, seeing he got the estate *præceptione hæreditatis*, by a disposition in the contract of marriage, clog'd with no irritancies, but rather containing clauses inconsistent therewith. Fountainhall, 25th June 1701, Borthwick *contra* Borthwick.

CONDITIONAL clause. Stair, 10th July 1672, Schaw *contra* Ld. of Clackmannan.

Effect of a
resolutive con-
dition.

A MAN's heir having ratified a bond granted by his predecessor, and also a legacy left to another party, obliging himself in the bond of ratification to pay the legacy, upon condition *the party to whom the bond was granted, should relieve the estate of all other inconveniencies, otherwise, his said obligation to be null*; the estate was afterwards distressed for a great sum; yet the Lords found, That the said resolutive condition was to be understood so that the bond should not be void altogether, but only effeiring to the distress. Dirleton, 12th December 1676, Durham *contra* Durham.

CONTRACT, when conditional, when mutual. See Mutual Contract.

————— For the meaning of conditional clauses. See Clause.

————— Bond of provision, donations mortis causa, legacies, &c. if they imply the condition of survivance. See Implied Condition.

————— Where the question is, Whether the clause imports a proper substitution, or a conditional substitution. See Substitute and Conditional Institute.

CONFIRMATION.

No real right
established by
an infeftment
a me, until it
be confirmed.

A N infeftment of annualrent was found null *ope exceptionis*, because granted to be holden of the king, and not confirmed. Hope, (*Confirmation*) 8th March 1620, L. Balmerino *contra* Cotfield. — A party served heir in general to the receiver of a disposition (who died infeft *a me*, without the superior's confirmation) having renounced and discharged the disposition, the Lords found, That the whole right in the defunct's person was conveyed by the general service to the heir, and the heir's discharge and renunciation was found to be a mid impediment, and effectual stop to any subsequent confirmation of the infeftment *a me*, to hinder it to operate *retro*, to validate the infeftment of another upon a special service as heir to the obtainer of the disposition. Forbes, 10th July 1713, Douglass *contra* Somervell. — Before confirmation the lands are understood to be in non-entry. Balfour, (*Non-entry*) 6th March 1566, the queen and Home *contra* Cranston.

ston.----- *In favorem* of a relict's infeftment, upon her contract of marriage, for her liferent-right, a base infeftment to be holden of the superior, not confirmed, is fufficient againft a fingular fucceffor publickly infeft. Gilmour, 15th January 1663, Campbell *contra* Lady Kilchatton.

SASINE being taken upon an obligation for infefting *a fe & de fe*, without relating fpecially to either, a posterior confirmation was found to perfect the fafine *a fe*, not only from the confirmation, but from the date of the fafine; upon which footing, the creditor, in an annualrent-right, having deceased before confirmation, the annualrent-right was found to be in the superior's hands by non-entry, who confirmed the fame. Stair, Fountainhall, 15th July 1680, bifhop of Aberdeen *contra* Viscount of Kenmuir.----- A superior confirming an infeftment indefinitely, which had been taken both *de me & a me*, conform to clauses in a difpofition for that effect, was prefumed to confirm the infeftment *a me*, to make the right publick, and he was preferred to the casualties. Marcus, (*Ward*) 15th February 1686, Lord Chancellor *contra* Brown. Marcus (*Infeftments*) June 1687, Bothwel of Glencorse *contra* Deans.---- A purchafer of lands charging the feller to purge diverfe infeftments of annualrent on thefe lands; the Lords found the infeftments holden base of the granter might be fufficiently extinguished by refigning *ad remanentiam* in the feller's hands, who was the superior, and registering the fame; but, *quoad* the confirmed ones, their Lordships found, That the confirmation made them publick, tho' the fafine did not fpecially relate to the charter or holding *a me*, but was indefinite. Fountainhall, 25th July 1699, Oliphant *contra* Lindsay.

CONFIRMATION was found valid, being granted at any time, either before or after the difponer's or difponee's deceafe, providing there was no interveening impediment of any other more lawful right made by the difponer before the confirmation. Durie, 17th July 1634, Lord Johnston *contra* Earl Queensberry and Johnston.

FOUND that a creditor confirming his author's base infeftment *ad hunc effectum* allenarly to make his own valid, confirms the relict's infeftment alfo, which was *in eodem corpore juris*. Gilmour, 15th January 1663, Campbell *contra* Lady Kilchattan.----- In a contract of marriage an eftate being difponed to the husband and wife in conjunct fee and liferent, upon which the husband and wife were infeft holding *a me*; a confirmation granted to the husband was found to accrefce to the wife, fo as to validate her infeftment in a competition with real creditors. Fountainhall, 22d July 1708, Lady Riccartoun *contra* creditors. Forbes obferves this decifion differently.---Confirmation of a charter granted to a fon, to be holden of the superior, was found a virtual confirmation of a liferent referved to the father in the charter, and the father's liferent efcheat was found to belong to the fubject superior, and not to the king's donatar, who contended to be preferred, as if the father's liferent was a personal right, and held of no superior. Durie, 4th December 1635, Ld. Craigevar *contra* Aikenhead.---A party, before his committing perduellion, having refigned his eftate in favours of himfelf in liferent, and his fon in fee, adding this general clause, *With and under the*

conditions and provisions contained in the procuratory of resignation; and having in that procuratory expressly reserved his lady's liferent infestment, the Lords, in a competition betwixt her and the donatar of the forfeiture of her husband, found, That, tho' the reservation in the publick infestment was in general terms, yet the Lady's liferent being particularly reserved in the procuratory of resignation, to which the general clause related, was equivalent to a confirmation, and therefore preferred the Lady to the donatar. Home, March 1684, Fountainhall, 17th March 1685, Colonel Maine, *contra* Lady Earlstoun.

What rights
require confir-
mation,

A CONJUNCT infestment granted to man and wife, to be holden of the crown, being null for want of confirmation; it was argued for the wife, That her interest needed no confirmation, resolving into a liferent, which is but a personal servitude, which was repelled. Stair, 16th January 1663, tenants of Kilchattan *contra* Lady Kilchattan, &c. Stair, 23d July 1669, Gray *contra* Ker.

Competition
among rights
confirmed.

IN case of double alienation of lands, the first being to a bride *secundum tenorem chartæ conficiendæ*, the last, tho' posterior, having obtain'd the first confirmation from the superior; the Lords preferred the same, and found that the date of the other confirmation could not be drawn back to the date of the alienation. Colvil, 12th July 1580, Lady Polmaise *contra* tenants.-----An infestment for relief of cautionry becomes perfect, if the failzie be committed, and it being first confirmed, it will prevail against an anterior infestment confirmed thereafter. Haddington, 25th January 1611, Pitfirren and Gray *contra* tenants of Panbroth.-----In a competition betwixt two infestments, the first confirmation was preferred, and the bare giving in of a signature to the exchequer was found not sufficient, unless all diligence had been used by the one, or precipitation by the other. Stair, 6th December 1678 Miln *contra* Ld. of Powfoulis.----The confirmation first expedite through the seals, found preferable, tho' the date of the charters were the same. Stair, 26th February 1680, Ld. of Clackmannan *contra* Earl of Wigtoun.----In a competition among creditors on a bankrupt estate, the Lords found, That a confirmation having first passed the seals, was preferable to another confirmation, tho' it was long before past in exchequer. Home, March 1682, Earl of Kincardin's creditors competing.-----In a competition of confirmations which are consummated by sealing, the first appending of the seal to the charter regulates the preference, tho' the confirmation and charter in exchequer be posterior, unless it appear, that the keeper of the seal was *in mora* by an instrument taken against him, and the thing be quarrelled *de recenti*. Marcus, (*Infestment*) 8th July 1691, Sinclair *contra* creditor of Langtoun.

CONFIRMATION operates a discharge of the superior's casualties. See Implied Discharge.

CONFIRMATION makes not a base infestment publick. See Base Infestment.

DEEDS that have the force of a confirmation. See Virtual Confirmation.

CONFIR-

CONFIRMATION of testaments, as to the subjects that require confirmation. See Service and Confirmation. As to the place where. See Forum competens.

CONFUSIO.

A CREDITOR in a moveable debt coming to be executor to his debtor, the Lords found that he could have no action against the heir for the debt, because both creditor and debtor were confounded in one person. Auchinleck, (*Executor*) 18th March 1630, Hart *contra* Hart. --- An executor cannot take assignation to a debt due by the defunct, and then transfer it to another creditor, in order to his having action against the heir; and the assigney cannot insist against the heir for payment, until he first accompt for his cedent the executor's intromissions. Auchinleck, (*Executor*) Durie, 18th March 1630, Dalgerno *contra* Forbes.

AN apparent heir having purchased in an adjudication of his predecessor's estate, led upon the apparent heir's own bond, brought a process upon that title against some havers for exhibition of the rights and evidents of the lands, and delivery thereof; the defender alledged absolvitor, because the adjudication was extinguished *confusione*, which was repelled. Stair, 10th July 1662, Ker *contra* Ker. --- A person having apprised lands on a bond granted by the apparent heir, and the apprising coming afterwards in the next heir's person, who was liable *passive*, this heir assigning the apprising to a third person, and he excluding the creditors by it; the Lords found, That the apprising having been once in the apparent heir's person, it was thereby extinguished, so that he could not transmit it to a third party. Fountainhall, 21st July 1697, Johnston *contra* Johnston. --- Tho' an apprising, during the legal, purchased in by the heir served, becomes thereby extinct *confusione*, it is not the same where it is purchased in by the heir having a disposition of the apprised lands, tho' thereby liable to the debt apprised for *præceptione hæreditatis*, because *præceptio hæreditatis* is not an universal passive title, nor does the heir thereby become *eadem persona cum defuncto*. Fountainhall, 24th January 1694, Burnet of Carllops *contra* Nasmith of Possö. --- An apparent heir liable *passive* upon behaviour, having purchased an apprising upon his predecessor's estate while the legal was current, and conveyed the same to a singular successor, the same was found effectual in a competition, and not extinguished *confusione* in the apparent heir's person. Home, 27th January 1728, Murray *contra* Nielson.

A DEFUNCT's personal creditor succeeding as heir to him, the Lords found that he may yet pursue the executor for the debt, which was not found taken away *confusione*. Haddington, 20th July 1610, Johnston *contra* Ireland.

A GENTLEMAN having disposed the bulk of his estate to his second son and certain heirs of tailzie, with the burden of relieving the heir of line of the debts; and after the eldest son's death without issue, the second son being served heir both of line and provision, the oblige-

ment for relief was found not extinguished in his person, tho' he was both heir and creditor in the said relief, and therefore his heir of line, who was also heir of line to the maker of the tailzie, was found to have relief against the heirs of provision, so as to have the unentailed estate disburdened of all the debts. Stair, 21st December 1686, Lady Margaret Cunningham *contra* Lady Cardross.

IN the year 1683, Alexander Irvine of Drum made a tailzie of his estate in favour of himself and the heirs-male of his body, which failing, to certain other heirs-male named: In the year 1687 the said Alexander Irvine did execute a bond of provision for the sum of L. 80,000 Scots to his second son Charles, and the heirs-male of his body, which failing, to the other heirs-male of the persons nominated and designed by him to succeed in his lands and heretages; the heirs-male of the entailer's body having failed, the succession, both of the entail'd estate and of the bond devolved upon Alexander Irvine of Murthill, who was accordingly served heir of tailzie to the said estate, but did not expedite any service to the said bond of provision. After his decease, his son and apparent heir granted a bond for L. 10,000 Sterling to a trustee, who thereupon charged him to enter heir of provision to Charles, in order to make up a title by adjudication to the L. 80,000 bond; and having thus established the bond in his person, he again charged the apparent heir to enter heir of tailzie in the estate of Drum, and obtained an adjudication against the estate for the said debt of L. 80,000: In a process at the trustee's instance against the heirs of entail, concluding, That the bond of L. 80,000 Scots was a subsisting debt, and did effectually burden the entail'd estate of Drum, the Lords found, That the heir-male of Murthill, being served heir to the estate of Drum, his service did not state him in the right to the L. 80,000 bond, so as to operate a confusion in his person, and that this Drum being charged to enter heir in special to Charles, and adjudication having thereon followed, did not operate a confusion of debtor and creditor in this Drum's person; and therefore found, that the said bond of provision is not extinguished, but is still a subsisting debt upon the estate of Drum. 4th January 1726, Cuming of Coulter *contra* Irvine of Crimond, &c.

APPARENT heir applying the rents for purchasing an adjudication, operates an extinction. See Payment.

CONQUEST.

Clauses of conquest, how far extended.

HE who by contract of marriage was bound to infeft his wife in conjunct-fee of all future conquests, acquiring thereafter lands holding burghage, which, by acts of the town, could be enjoyed only by burghesses their heirs-male, &c. his heir was ordained *præstare damnum & interesse* to the relict. Haddington, 14th March 1623, Skeen *contra* Forbes. — A husband being bound by his contract of marriage to infeft his wife in all lands and heritages he should conquest during the marriage, and having, during the subsistence thereof, first acquired tacks

tacks of certain lands, and, some years thereafter, the heritable right thereof, she was found to have right only to the rents of the lands, as payable by these tacks, but not to the profit accruing from the tacks, in respect there was no express stipulation in the contract, providing her to the liferent of tacks or other securities purchased during the marriage. Durie, 12th March 1628, Lady Dunfermling *contra* Earl — A husband being bound to invest his wife in the conquest of all lands, annualrents, &c. and having lent out money upon annualrent, bearing no clause of investment, yet it was found that the clause comprehended this subject. Durie, Spotiswood, (*Husband and Wife*) 20th February 1629, Douglas *contra* White. — Found that an obligation in a contract of marriage to provide the wife to a liferent of what lands, tiends, annualrents, &c. (not mentioning sums of money) should be conquest during the marriage, was found not to extend to the annualrent of moveable sums. Marcus, (*Contracts of Marriage*)

February 1682, Aitken *contra* — Found that an obligation, to provide a wife to a third in liferent of lands and heritages, to be conquest during the marriage, did comprehend a sum belonging to the heir by a clause secluding executors, as falling under the word *heritage*. Marcus, (*Contracts of Marriage*) March 1682, young Prestongrange *contra* Lady Craiglieth. — A clause of conquest, providing to the wife the liferent of all lands, annualrents, goods and gear conquest during the marriage, was found not to extend to bonds, unless the wife could prove that they came in place of, and were purchased by *the goods and gear* acquired during the marriage. Stair, Gosford, 15th July 1673, Robison *contra* Robison. — The daughters of a second marriage being served heirs, in virtue of a clause in their mother's contract, bearing a provision of *all goods and gear to be conquest during the marriage, to the children therein procreated*; in a reduction of this service by the children of the first marriage, found that these words in the clause of conquest could not extend to houses, unless it had also born lands and heritages. Fountainhall, 5th February 1696, Young and Chalmer *contra* Young and Mackie. — In a contract of marriage there is a provision of conquest in favours of the bairns of the marriage, in the common stile, of all that the husband should *conquest or acquire* during the marriage: During the standing of the marriage, the husband got left him as a pure donation, by way of legacy, the sum of 12,000 Merks, and the question thereupon occurred, Whether this was comprehended under the above clause of conquest? The Lords found it was not. July 1730, Mercer *contra* Mercer. — The like, Stair, 29th January 1678, Stewarts *contra* Stewart.

A LADY being provided in her contract of marriage to the liferent of the conquest during the marriage; her husband having accordingly purchased some lands, but invest his son therein, without any reservation to himself, yet these lands were found conquest in the father's person, *ad hunc effectum*, to give the Lady the liferent thereof, altho' the price was still unpaid, and the son, as heir to his father, was bound to pay the same, and yet the Lady to have the liferent of the lands. Spotiswood, (*Husband and wife*) 3d June, Durie, 3d July 1627, Earl of Dunfermling *contra* his mother. — Yet in a case paralel to the preceding, the heir having paid the price after his father's death, and retired

Provision of conquest, if burdened with debts contracted during the marriage.

tired the bond granted by the father for the same; the Lords found, That the heir ought not to provide the relicf in the liferent thereof, but with the burden of paying annualrent for that sum unpaid by the defunct; the reason of which was, That the bond granted by the defunct exprefly bore to be for payment of the sum owing by him for the price of thefe lands. Durie, Spotifwood, (*Husband and Wife*) 24th January 1629, Ld. Renton *contra* his mother. — The like, Stair, 20th, Dirleton, Gilmour, 21ft December 1665, Dickfon *contra* Sandilands. — A clause of conquest in a contract of marriage, in favours of a wife, of all lands, fums of money, &c. to be purchafed during the marriage, extends only to what the husband acquired during the marriage more than what he had at the time of the contract, and with the burden of all his debts contracted during the marriage. Stair, 27th June 1676, Earl of Dunfermling *contra* Earl of Callendar.

Subjects purchafed, partly before, partly after the marriage, how far reputed conquest.

A WIFE being provided to all conquest during the marriage, the Lords found a reverfion used after the faid contract to be of that nature, and that therefore the benefit thereof ought to be difponed to the wife, by virtue of the faid clause. Hope, (*Husband*) 19th July 1627, Countefs of Dunfermling *contra* the Earl her fon. — The Lords found, That new rights acquired, during the marriage, to lands, which the purchaser had fome right to before the marriage by expired comprifings, or irredeemable difpofitions, are not to be reputed conquest; fo that fuch fupervenient rights, tho' preferable, accrefce to the former, and are but the completing of a conquest begun before the marriage. Falconer, 6th February 1683, Wauchop *contra* Ld. Niddrie. — There being a clause in a contract of marriage, whereby, in cafe of no children, the conquest was to divide betwixt the husband's and wife's heirs; and the wife having, in the faid contract, difponed her lands to her husband in liferent, and heirs of the marriage in fee, which failing, to her own heirs; and thereafter, during the marriage, having, for moft onerous caufes, difponed the faid lands to her husband abfolutely; this acquifition was found to fall under the clause of conquest, tho' the husband was *ab ante* liferenter; and therefore, there being no heirs of the marriage, the one half was adjudged to belong to the wife's heirs. Fountainhall, Forbes, 12th December 1707, Fergus *contra* Birrel. — A defunct having been bound to infeft his Lady in all his conquest, it was found, That the lands wherein he was infeft before the marriage, being fold to a vaffal, whose feu was never confirmed (and fo, whose right being kirk-lands, was null, and would not have excluded the defunct) the acquiring of this feu by the husband, after the marriage, from the faid feuar, was not conquest, feeing the feu was null, and could not be underftood as an acquifition, the husband ftanding in the abfolute right before, both of property and fuperiority. Durie, 30th June 1629, Lady Dunfermling *contra* the Earl.

Sums conquest, but applied for purging incumbrances.

A WIFE by contract of marriage, being provided to the liferent of what the husband should conquest, or, of what fums he should receive payment of during the marriage, was found not entitled to the liferent of fums conquest during the marriage, which had been applied by the husband for purging incumbrances upon his eftate. Marcus, (*Contracts of Marriage*) Lady Collington *contra* heir of Collington.

A PRO-

A PROVISION to a wife in a contract of marriage, of her liferent of all ^{Rights conquest, but taken in favour of younger children.} fums *to be acquired by the husband, and taken to himself and to his heirs*; this clause was found to comprehend the liferent of fums, the fee whereof was provided to the second son. Durie, 16th July 1625, Knox *contra* Brown.-----An obligation to provide the wife in liferent of all fums conquest, was not extended to certain fums which the husband had taken the debtors obliged to pay to some of his younger children, but only to those which he had acquired to himself and his heirs. Durie, 10th February 1629, Oliphant *contra* Phinnie.

FOUND, That lands conquest and sold again, do not fall under the clause of conquest in a contract of marriage: Also, a feu being acquired and disposed again to the said feuar for a greater feu-duty, the augmentation of the feu-duty only was reputed conquest. Durie, 26th November 1629, Lady Dunfermling *contra* her son. ^{Lands conquest and sold again.}

By contract of marriage the husband bound himself to imploy 3000 merks for his wife's liferent use, and by a posterior clause provides her to the liferent of all lands conquest during the marriage; it was found, That this clause of conquest could only be understood of what was conquest, more than answerable to the annualrent of the 3000 merks. ^{Liferent of the conquest over and above the liferent of a sum certain.} Stair, 4th January 1672, Beattie *contra* Roxburgh.

HOW far the husband is bound by clauses of conquest. See Provisions to Heirs and Children.

CONSIGNATION.

A PURCHASER of land having granted bond for the price, which he could not directly pay, because of incumberances; the seller, some terms thereafter, intimated to him, he would be ready to receive the price at Whitsunday then next; the money was accordingly offered at the term, but incumberances not being purged, the purchaser took a protest for cost, skaith and damage, and to be free of interest, in regard he was to consign the money, which he accordingly did, in the hands of a private banker. The Lords found him free of interest, tho' it was pled, There could be no regular consignation, except upon a suspension in the hands of the clerk, from whom the creditor has access to demand the money by authority of the court. 1st February 1738, Robertson *contra* creditors of Matthieson.

UPON whom lies the hazard of consigned money. See Peticulum.

CONSIGNATION in order to redemption. See Redemption.

CONSOLIDATION.

THE Lords found, That a servitude of thirlage being once consolidated with the property, cannot be understood to revive again when any part of that property is alienated, unless it be so expressed. Sinclair, 1st July 1542, Innes *contra* Stewart. — There being a servitude upon a whole abbay, prestable to the forrester, he having the lands himself, and disposing or excambing the same, without reservation of the servitude; the Lords found the lands free thereof. Gosford, 29th January 1670, Home *contra* Home.

A TACKSMAN acquiring the property of the lands from the setter of the tack, may, after the infeftment is taken out of the way, recur to his tack to defend himself against a third party. Hope, (*Tack*) 12th March 1628, Earl of Dunfermling *contra* the Countess. Maitland, Spotiswood, (*Dominion*) 6th February 1566, M'Doual of Garthland *contra* Campbell. Haddington, 23 February 1610, Hamilton *contra* his sister. The like found against the donatar of the setter's liferent escheat, who had reduced the infeftment as granted in *cursum rebellionis*, Durie, 11th December 1634, Ld. Lesmore *contra* Hutchison.

A MAN having acquired double infeftments, as is usual, and having taken infeftment publick by resignation, to be holden of the superior; and that infeftment being thereafter reduced at the instance of a third party; the Lords found, That he could not return and defend himself in a removing by the other base infeftment, but that the publick one made the base to cease. Durie, 3d July 1624, Earl Annandale *contra* Johnston. — A father having infeft his son in his estate, to be holden base of himself, and the son dying, so that the father succeeding again to him, and serving himself heir, but doubting how to infeft, being both superior and vassal, and if he could direct precepts to infeft himself; the Lords, on a bill given in by him, directed precept to the sheriff of the shire to infeft him; but thereafter their Lordships found, That he needed no new infeftment, but that his old one reconvalesced, and his retour consolidated the property with the superiority, without a sasine. Fountainhall, 23d July 1687, Elies supplicant.

AN estate being disposed to an eldest son in his contract of marriage, and to the heirs-male of his body, which failing to the heirs-female of his body; the said eldest son, after the father's decease, neglecting to infeft himself upon the disposition in the contract, made up his titles as heir of the investiture; again, after his decease, his son made up his title also as heir of the investiture, and thereupon made a gratuitous conveyance of the estate: The heirs-male of the marriage having failed in him, the heir-female was served heir of provision in general upon the contract of marriage, and thereupon claim'd the estate upon this *medium*, That the gratuitous disponent can be in no better situation than the heir general, or the heir of investiture, who would be bound by the deed of his predecessor, granter of the disposition in the contract of marriage. It was answered, That the disposition being in favours of the apparent heir, was absorbed by his making up titles to the estate as heir general, and it would be an useless form to oblige him to infeft himself over again upon the disposition in the contract, or to oblige his son to serve heir of provision to him

in

in general, in order to carry the provision in the contract, which would not make the estate more amply theirs, than it was by their making up titles as heirs of the investiture. The Lords repelled the alledgeance, That the right of the contract of marriage was not established in the person of the heir, in respect of the answer, That the real right of the estate was established in his person. 6th July 1736, Edgar *contra* Maxwell.

A PROPRIETAR made a tailzie of his estate; at a time when there was a proper wadset upon part of it, and the wadsetter publicly infest; the heir of entail afterwards purchased in the wadset, and took the same to himself, his heirs and assignies whatsoever; the question occurred betwixt the creditors of the purchaser and a posterior heir of entail, Whether this wadset was fopite, and the whole lands subjected to the entail, or if it was a subsisting right, and a different subject from the entail'd estate, affectable by the creditors of the heir of entail? The Lords found the wadset affectable by the creditors. 4th February 1736, Earl Peterborough *contra* creditors of Fraser of Dures.

CONSUETUDE.

A SASINE within burgh was sustained tho' granted by one who was not town-clerk, and tho' there was another, in regard the giver was habite and repute town-clerk, and was in use to give fines. Hope, (*Safine*) 15th July 1615, Douglas *contra* Chieffly. --- A bond subscribed by two notars, whereof the one was hang'd for not being one, yet because he was *tentus, habitus & reputatus*, it was sustained, being for a small matter. Haddington, 16th January 1610, Spence *contra* executor of Reid. --- The like, Maitland, 6th May 1553, Cunningham *contra* Lady Semple. --- An execution being quarrelled, because the messenger was deprived; this found not relevant, unless the deprivation was published at the mercat-cross of the head burgh where the messenger dwelt. Haddington, 4th June 1608, Somervell *contra* Ld. Jeriswood. --- An execution by a deposed messenger was sustained, he being holden and repute at that time as a messenger; and officiating as such. Stair, Gosford, Dirleton, 10th November 1676, Stewart *contra* Hay. --- A messenger's execution being quarrelled, because he was deprived, and the deprivation published at the mercat-cross of Edinburgh, it being for no malversation, but deficiency in paying the Lyon's dues, and being still habite and repute a messenger; the Lords repelled the objection, and sustained the execution notwithstanding thereof. Fountainhall, 11th July 1699, Learmouth *contra* Gordon. --- A nullity objected to an execution of poinding, was sustained, *sciz.* That the poinding was perform'd, and the execution thereof subscribed by a person, who was, by the Lyon-office, depriv'd from being a messenger at arms, and his deprivation intimated or advertised in the publick news prints, prior to the poinding. 18th February 1732, Hunter *contra* Montgomery of Pearlstonhall.

Judge acting
extra territorium.

IN a competition of creditors, an objection was laid against a decret of furthcoming, That it was pronounced by the magistrates of Edinburgh against inhabitants of the Canongate, over whom they had no jurisdiction; the Lords were of opinion, That the baillies of Edinburgh had no jurisdiction over the inhabitants of the Canongate, yet they sustained the decret upon *use and wont*, the baillies having been in the constant custom of exercising such a jurisdiction; but they concerted an act of sederunt, discharging such jurisdiction in time coming.

July 1730, Blair *contra* the incorporation of Mary's chappel.---- A decret recovered before the magistrates of Edinburgh, against an inhabitant of the Canongate, held as confest, upon a citation *pro confesso*, was, after his decease, found intrinsically null, the defender not having been subject to the jurisdiction; and one cannot be understood as contumacious in not answering to a citation before an incompetent judge, *extra territorium jus dicenti impune non paretur*; and the Lords did not regard the *communis error*, and constant consuetude of the magistrates of Edinburgh, exercising a jurisdiction over the inhabitants of the Canongate, which might be sufficient to support diligence upon a debt habily constituted, which is favourable, but can never be sufficient to found a debt, where there is no other document save the decret itself. 17th February 1736, Leggat *contra* Denoons.

Judge acting
in feriat time.

A DECRET and precept of poinding was sustained, tho pronounced in Christmas vacance, because inferior judges used to sit frequently and administer justice in such times, wherefore the Lords thought it hard to annul their proceedings; but here this was sustained for purging of a spuilzie, which is odious. Durie, 5th December 1635, Sutor *contra* Cramond.

Legal diligence executed
at a wrong place.

LANERK is the head burgh of the sherrifdom of Lanerk, where executions are lawful against all persons dwelling within the shire, because, albeit there be two wards, yet there is no distinct jurisdiction, judge nor clerk: But a denunciation of a man of the nether-ward at Rutherglen, will not be found null, by way of exception, in respect of the custom to denounce thereat. Haddington, 14th February 1610, Cairncross *contra* Hamilton.---- In a shire where there are no royal burghs, but a certain place appointed by act of parliament for denunciations upon hornings; and a party not having denounced there, but at another place where denunciations were frequently made since that act; the horning was sustained, notwithstanding the act, in respect of the said posterior custom. Durie, 16th June 1626, Prior of St. Bathans *contra* Carmichael.---- A poinding executed at a place that was neither head burgh of the shire nor regality, sustained, because of the frequent custom to poind there, the head burgh of the regality being 24 miles distant. Durie, 18th March 1630 Chisholm *contra* Torsonce.---- An inhibition not found null, for being executed within the shire of Berwick at Duns, and not at Greenlaw, notwithstanding of the act of parliament appointing Greenlaw to be the head burgh of the shire, and that because of the consuetude, and the said act was only a private act, never printed nor known in the country. Durie, 7th March 1632, Dickson *contra* Scot.---- An inhibition being quarrelled, as not duly executed at the head burgh of the regality of St. Andrews, it was offered to be proved, That legal diligences against these lands were usual-ly

ly executed at Strathern, which is sufficient to maintain the execution quarrelled. Reply'd, *Non relevat* that diligences were indifferently executed at Strathern or St. Andrews, unless the defender will offer to prove, That for the space of 40 years all diligences concerning the said lands were executed at Strathern; for if any one execution has been made at St. Andrews within the 40 years, it preserves the privilege of the regality conform to act of parliament. The Lords found it relevant to support the inhibition, that for the space of 40 years, all diligences concerning these lands were executed at Strathern, and not that executions were made promiscuously at Strathern and St. Andrews. Marcus, (*Inhibition*)

March 1685, Margaret Crawford *contra* Oliphant Conde.--- In a competition, it was objected against an inhibition, led against an inhabitant of the town of Kirkaldie, That it was executed against the lieges at Coupar, the head burgh of the shire, whereas it ought to have been executed at Dunfermling, the head burgh of the regality within which Kirkaldie lies. It was answered, That *communis error facit jus*, and it was commonly understood, that the town of Kirkaldie was not within the regality of Dunfermling; for a proof of which, a condescendance was given in from the 1644, downwards, by which it appeared, that most of the diligences against the inhabitants of Kirkaldie were executed at the head burgh of the shire, many of them at both the head burghs of the shire and regality, and half a dozen of them at the head burgh of the regality only. On the other hand it appeared, That a great number of the processes had been carried on against the inhabitants of Kirkaldie before the regality court; and it was pled against the inhibitor, whatever might be the case, were the question only with the debtor, yet in a competition of creditors, every objection ought to have its full weight. The Lords sustained the objection against the inhibition, that it was not executed at the head burgh of the regality. 20th February 1733, Hay of Strowie *contra* creditors of David Simpson.

A VASSAL of a regality was unlawed for his not compearance at his superior's head-court, tho' holden at another place than was contain'd in his infeftment, because of 30 years custom to keep the courts at that place. Haddington, 7th December 1622, and 12th February 1623, Innes *contra* Grant.

Head-court held at a wrong place.

IN a competition for the rents of a house within burgh betwixt two real creditors, this nullity being objected, That in the resignation made in the magistrates hands, the symbols were earth and stone; whereas their fixt and known symbols are staff and baton; the Lords having tried at the town-clerk's office, and finding there were many in the same condition, did sustain the sasine and resignation, and repelled the nullity; but resolved to make an act of federunt discharging that practice in time coming, under the pain of nullity in all competitions with other creditors more formally infeft. Fountainhall, 7th February 1708, Sir Thomas Young *contra* Calderwood.

Wrong symbols of sasine.

SASINE of a tenement in Leith, tho' not registred in the general register, but given by the baillies of Edinburgh, was sustained, tho' as not being a royal burrow, that place did not fall under the exception of the act of parliament 1617, anent registration of Sasines; but

Sasine not registred.

this was sustained, in respect of the constant custom of giving such fines by the said baillies, and because of the danger that many of the lieges rights would fall into, if this nullity should take place. Durie, 10th July 1623, Edmiston *contra*

Deed executed in a wrong form.

IT being the custom of a burgh, that all reversions should be under form of instrument taken in the town-clerk's hands; the Lords sustained the same, altho', regularly, reversions cannot be valid, unless subscribed by the party. Maitland, 15th June 1554, Galloway *contra* burgh of Dunbarton.

Process carried on in a wrong form.

A DECRET of lyming, given by the provost and baillies of Dunfermling, was reduced, because the brieve was not proclaimed upon fifteen days, nor a precept directed upon a claim given in by the purchaser of the brieve, to summon the special parties having interest thereto, nor any formal order of process kept, tho' it was alledged to be conform to the ordinary custom and manner of proceeding in that burgh. Durie, 13th February 1629; Wright *contra* Stirk. — Decreet subscribed by the commissar, in place of the clerk, sustained, because of the custom, but found the custom not right, and therefore not to be sustained in time coming. Durie, 10th February 1631, *contra*. — An admiral's decret in absence, for not finding caution *judicio fisci & judicatum solvi*, was found null, and turned into a libel, upon this ground, That the decerniture or warrant thereof was not signed by the judge, notwithstanding, that by the custom of the court, the judge had not for a long time signed any such decernitures. Forbes, 15th July 1708, Houston *contra* Lord Rois.

Term of entry.

WHERE access to a house, or chambers set in tack, is required ten days after the agreed term of entry, but not given for twenty days, so that the tacksmen comes to be obliged to take another lodging; he is free from the tack, and cannot be obliged to pay the rent, tho' it be proved, That by the custom of the place, entry to the possession of such lodgings is not commonly given sooner than twenty days after the term. Durie, 20th July 1633, Brown *contra* Maxwells.

Informal execution.

A DECRET by the provost and baillies of Edinburgh, found intrinsically null, without necessity of a reduction, being given against the suspender, holden as confest, because the town officer's execution, by which he was cited to give his oath, wanted witnesses, tho' it was alledged, That in the burgh of Edinburgh, the form was, that no executions had witnesses, but that the officers were sworn in judgment upon the verity of their executions; which form the Lords would not allow, because thereby the ordinary mean of improbation, *viz.* by the witnesses, was taken away. Durie, 17th June 1624, Crawford *contra* Wood. — The like, where the custom was to cite parties without any written execution. Durie, 25th July 1626, Dickson *contra* Anderson.

Sentence-money.

ALTHO' by the general custom of Scotland, sentence-money belongs to the judge, yet the Lords found, That the particular custom of one place derogates from the general, and that being proven, they prefer'd the clerk. Fountainhall, 11th December 1684, Cathcart *contra* Irvine.

COUR-

COURTESY.

HE who married a woman who had heretage, and procreat a living child upon her, will get the curiality, albeit he be her second or third husband. Haddington, 7th June 1610, Spence *contra* L. Durie.----- The second husband of an heiress cannot claim the courtesy, where there is a son of a former marriage alive. Fountainhall, 1st December 1702, Darleith *contra* Campbell. Who has right to courtesy.

ALTHO' the children die before the mother, and both within the year, yet the husband has right to the courtesy. Nicolson (*Courtesy*) place. 20th July 1632, Stewart *contra* Irvine. When it has place.

THE courtesy only takes place where the wife succeeded in lands to some of her predecessors, but not where she acquired them herself *ex titulo singulari*; and this because of the uniformity of all our authors and decisions on this head. Fountainhall, Forbes, 22d June 1709, Lawson *contra* Gilmour. 11th January 1740, Hodge *contra* Frazer. --- Courtesy not due in burgage lands, because female succession has no place in burgage-holding. Bruce, 16th June 1715, Gordon *contra* Clark. In what subjects.

A HUSBAND possessing by the right of courtesy, is liable for the annualrents of the personal, as well as of the real debts. Home, 3d January 1717, Anna Monteith *contra* her nearest of kin and creditors, To what burdens subjected.

AN heiress's infestment upon a service to her predecessor's, being quarrelled by a reduction after her death, upon alleged nullities, in order to disappoint her husband of his right of courtesy; the Lords found, That the heiress's infestment not having been quarrelled in her lifetime, was sufficient to support the courtesy, upon this ground of equity, That had it been quarrelled during her life, these nullities might, and would have been supplied. 15th June 1716, Hamilton *contra* Boswal. Courtesy may have place where the defunct heiress was not habily infest.

CREDITORS of a DEFUNCT.

Decisions upon Act 24th, Parl. 1661.

UNDER apparent heirs, in act 24th, Parl. 1661, are comprehended *nominatim* substitutes in bonds or other rights; so that the creditors of the institute are preferable to the creditors of the substitute. Forbes, 9th February 1711, Graham *contra* M'Queen and Drummond. Who understood apparent heirs in the sense of the act.

THE Lords preferred the creditors of a defunct, before the creditors of his executor, as to all the defunct's moveables that were extant, tho' the act statutes solely with respect to the heretable estate. Stair, 16th December. Takes place in moveable, as well as heretable succession.

December 1674, *Ld. Kilhead contra Irvine*. Gosford, 29th July 1675, *Hall contra Thomson*. The like. Stair, 8th July 1664, *town of Edinburgh contra Lord Ley*.

What diligence
necessary, in
order to give
preference.

IN a Competition between the creditors of a defunct, and the creditors of his apparent heir, the Lords found, That the defunct's creditors ought to do exact and complete diligence against his estate within three years after his death, unless they can make appear, that their diligence was retarded without any fault of their's, by opposition from the heir, or other creditors, or the surcease of justice or the like, and preferred a disposition by the heir to one of his creditors, granted within three years after the defunct's decease; albeit the creditors of the defunct had obtained a decret *cognitionis causa*, within the three years, the decret of adjudication being after. *Harcus, (Prescription)* March 1685, *Lord Ballenden contra Murray*. The like. Forbes, 17th, Fountainhall, 18th June 1712, *Scot contra Ker*.

The three
years, how
computed.

THE Lords found, That the axiom *contra non valentem agere, non currit prescriptio*, takes no place in the short prescriptions; and that the three years are not to be understood of *anni utiles*, but *continui*; and therefore, that the act cannot be extended to this case, where the term of payment fell sometime after the defunct's death, and the creditor had done diligence within three years, counting from the term of payment. Fountainhall, Stair, 19th December 1678, *Paterfon contra Bruce*.

No bar a-
gainst dispo-
ning to the de-
funct's credi-
tor, even with-
in the year.

A DISPOSITION granted by the heir to the defunct's creditors within a year after the defunct's decease, is not quarrellable, seeing the act is conceived in favours of the defunct's creditors. Nor is a disposition by the heir to one of his own creditors, quarrellable by another of his creditors. *Harcus, (Prescription)* March 1685, *L. Ballenden contra Murray*.

Decisions upon the Act of Sederunt 1662.

Who entit-
led to the be-
nefit of the act.

IN a special declarator, at the instance of a donatar of escheat, compearance was made for an executor-creditor who had confirmed the subject, prior to the gift or general declarator; alledged for the donatar, That as the confirmation could not exclude another creditor, doing diligence within six months after the rebel's decease, no more could it exclude the pursuer's declarator, raised within the six months. The Lords preferred the executor-creditor, in respect the act of sederunt only concerns creditors, and the donatar is *in causa pœnæ*. *Harcus, (Escheat)* March 1685, *Captain M'Reith contra Kennedy*.

What dili-
gence neces-
sary.

A TESTAMENT being confirmed by the defunct's creditor, and the same subject being again confirmed by another creditor within the six months; the Lords found, That whatever defect might be in the second confirmation (as making thereby two principal testaments, which seems inconsistent) yet that it was sufficient to give the second the benefit of coming in *pari passu* with the first. Fountainhall, 2d January 1708, *Ramsay contra Nairne*. --- A creditor of a defunct having pursued

ed a vicious intrometer with the defunct's effects, the bare citation was found to give him the benefit of the act of federunt 1662, 18th December 1729, Hay *contra* Black.

CREDITORS of a defunct, after the six months, are preferable according to the dates of their citations against the executor; tho' it was ^{Creditors how preferable, doing diligence after the six months.} pled by the competing creditor, whose diligence was first completed. That, from the nature of the thing, a citation, which is only a step of diligence, can give no preference, that it is the first completed diligence, not the first inchoated, that is to be considered. July 1723, Gray *contra* Callendar. — An executor-creditor having confirmed a bond due to the defunct, containing a greater sum than sufficient to pay his debt; a competition arose upon the balance betwixt two other creditors of the defunct, each of them having raised a process against the executor-creditor, and insisted in their respective processes, while the executor-creditor was yet in *constituendo*, and had recovered no decret against the debtor in the bond; both citations being after elapse of the six months; the one insisted for a preference upon his first citation; the other pled, That citation makes no *nexus realis* upon the subject, and consequently is no foundation of preference; that the first decret must be the rule, and seeing no decret is yet obtained by either, they ought to be ranked *pari passu*. The Lords brought the parties in *pari passu*. 15th February 1738, Græme *contra* Murray.

DAMAGE and INTEREST.

NO probation of a real *interesse* was allowed, where a conventional one is stipulated. Colvil, July 1583; Cumming *contra* Lady Ruthvens.

A PERSON charged upon his obligation to deliver to the charger an adjudication upon a third party's estate by a precise day, under a penalty, by and attour performance, having made diligent search for the adjudication in order to delivery, and not being able to find it, was found liable only for damage and interest to the charger, in so far as his right to the sums in the adjudication might have been made effectual against the adjudged estate, had the adjudication been delivered in due time. Forbes, 20th June 1710, Hamilton *contra* Laird and Lady Airth.

A PARTY being liable to pay certain bolls of victual betwixt Yule and Candlemas; the Lords found, That as he might have paid the same on Candlemas day, so he might then have made offer thereof; but that in all cases of that kind, the making such offer does not liberate as to the highest prices, unless the party be in *mora* to receive the victual, either the time of the offer, or six days thereafter. Dirleton, 16th June 1675, Gray *contra* Cockburn.

THE Lords found action not competent against an heir for damage sustained by the predecessor's relict through the want of her jointure-house

house all the years of her widowhood, occasioned by the not-performance of her husband's obligation in her contract of marriage, to build and repair the house for her accommodation, unless the heir had been required to build and repair in her lifetime, because *damnum & interesse* can only be due after *mora*, and there was no *mora*, since there was no requisition; and tho' requisition had been made, damages would have only been due from the date thereof. Forbes, 18th November 1712, Nairne *contra* Barclays.

A TIERCE of brandy being seized as run goods, before it was delivered to the purchaser, and he being obliged to redeem it, by paying treble excise, and insisting for damage and interest against the seller, the Lords sustained the claim for the true damage, *viz.* the composition paid, and not what he might have made more in retailing. Fountainhall, 25th January 1687, Spence and Watson *contra* Ormiston. ---
A carrier's horse hired to carry 16 stone, dying by being overloaded, the merchant having put 20 stone upon his back; the Lords sustained process for the price, but not for the profits that might have been made of the horse. Haddington, 10th July 1610, Straiton *contra* . ---

A cargo of wheat being damaged by the skipper's fault, yet seeing the victual remained *in specie*, and was not wholly corrupted, but appeared to be useful for ship-bisket; and seeing the property still remained in the merchant, and the owners of the ship only liable for damages, the Lords ordained the merchant to receive the wet victual, and the owners to pay him what it was worse than the price it would have given at Leith, if the voyage had held. Stair, 19th February 1670, Leslie *contra* Guthrie.

SIR James Mercer of Adie, having no sons, did dispoise his estate to his eldest daughter, she marrying a gentleman of the name of Mercer, who should have a reasonable fortune to pay his debts, and to portion his other daughters: The Lady considering that there was none of that name in Scotland who had a sufficient fortune for performing these conditions, did send to Ireland, and engaged colonel Mercer to come to Scotland, and treat for a marriage betwixt his eldest son and the heiress; the terms were accordingly agreed upon, and, upon the lady's faith, he brought over his son, with L. 2000 in bills; but she having changed her mind, would not so much as allow them to see the young lady; whereupon the colonel having raised a process for damages, the Lords considered it would be a dangerous preparative, to sustain action upon verbal treaties of marriage; yet it being libelled, That the lady had given full assurance, and had engaged the pursuer to be at great charges in the prosecution of that marriage, and notwithstanding had obstructed the same, tho' all was performed that she had required, they did therefore sustain the action, reserving to modify after probation. Gosford, Stair, 14th December 1675 Mercer *contra* Lady Adie.

ONE having disposed to his wife his whole moveable estate, with the burden of his debts, and also having granted her a bond for 3000 merks to affect the heritage, but with this condition, That in case the debts due to him should be found to exceed the debts due by him, the bonds should be diminished *in tantum*, and she, after her husband's decease, having intromitted with his writs *per averfionem*, without proper warrant; the Lords found this relevant to infer a presumption, that the debts due to the defunct did exceed the debts due by him,

to the value of the sum in the Lady's bond, or that the same were so accepted by her. Dalrymple, 4th November 1714, Campbell of Horsecleugh *contra* Lady Little-Cefnock.

DEATH.

A CREDITOR sending with his servant his debtor's bond to him with a letter, desiring he would pay the money to the bearer, the Lords found, That if the payment was made after the debtor knew that the writer of the letter was dead, he could not thereby be liberate, seeing it was to be presumed, that a servant was only to receive the money for his master's use, of whose death the debtor having knowledge, he was *in mala fide* to have paid. Durie, Spottiswood, (*Exhibition*) 2d February 1628, executors of Lord Duffus *contra* Forrester.

Morte mandantis cessat mandatum.

IN a contract blank in the sum, to be filled up by a third party with what sum he thought fit, the Lords found, That, tho' it was not done in his lifetime, yet, if he gave orders for another to do it, that was sufficient, notwithstanding the rule *mortuo mandante cessat mandatum*. Colvil, May 1581, Ramsay *contra* .---- The rule, That *mortuo mandante cessat mandatum*, was found not to take place in a procuratory *in rem suam*, where the procurator, who, by virtue of his procuratory, was pursuing debts, had already paid the sums to the constituent. Durie, ult. June 1629, Schaw *contra* Dunnipace.

Unless the mandat be in rem alienam.

A SASINE was decerned to be given by the superior upon a procuratory of resignation after the resigner's death, upon instrument taken against the superior for refusing before the resigner died. Haddington,

Procuratories and precepts.

February 1611, Robertson *contra* Baillies of Burntisland. ---- It was disputed betwixt Johnston of Carhead and Johnston of Newton's creditors, whether the act 1693, making procuratories and precepts perpetual, concerns only these granted by subjects among themselves, or if it comprehends also precepts issued forth of the chancery; the doubt arose from the words of the act, *Considering that procuratories of resignation and precepts of sasine become void by the death of the granters, &c.* and it was contended, That the word *Granters* is not applicable in stile to precepts issued forth of the chancery. Answer'd, There is no exception in the act, other than of precepts of *clare constat*, & *ubi lex non distinguit, nostrum non est distinguere*; for it says in general, *That, in all time coming, precepts of sasine shall be sufficient warrants for taking sasine, &c.* The Lords found, That the act 1693 comprehended precepts from the chancery, as well as these granted by subject-superiors. Bruce, MS. 4th July 1716. ---- A peer, whose honours were to heirs-male, having signed two procuratories of resignation in favours of his sister, resigning the dignity and honours in the sovereign's hands; but the resignation not being actually accepted during his life, and the sister, after his death, insisting in a declarator against the heir-male, to desist from using the said honours, concluding, that she had right to obtain from the sovereign a patent upon the saids procuratories,

curatories, tho' not executed before her brother's death, if the sovereign please to confer the same: Tho' the act 1693 speaks only of the property of lands, &c. yet the Lords found, That the procuratories did not become void by the death of the granter, but that they might still be perfected in favours of the sister and her heirs, if yet it should please the sovereign to accept of the same, and confer the title on her. Fountainhall, 28th March 1707, Lady Mary Bruce and her husband *contra* Earl Kincardin.

If the debitor die *pendente processu*.

CERTIFICATION being granted, but extract superseded till a day, and the defender deceasing *medio tempore*, the Lords refused to grant certification. Hope, (*Improbation*) 17th February 1629, Earl Mar *contra* his vassals. --- A decret being stopt upon a bill given in by the defender, which was ordained to be seen and answered, and the defender having died before bill and answers were advised, the Lords proceeded to advise them, and finding nothing alledged relevant to make any alteration in the decret, ordained the same to be extracted without transferring *passive*. Marcus, (*Decrets*) January 1686, Burgh *contra* Sir William Sharp.

If a master or tenant die after warning.

A WARNING against a father, who thereafter died, sustained as a ground for removing the son, who was called in the removing, without necessity of using a new warning against the son. Maitland, 25th February 1567, Home *contra* Kennedy, Durie. 27th January 1630, Home *contra* Home. --- An heir, after he is retoured and infeft, may pursue a removing upon a warning given by his predecessor, tho' his predecessor survived the term. Durie, 28th July 1637, Earl of Haddington *contra* his tenants. --- The like. Durie, 27th November 1629, Ramsay *contra* Home.

If a debitor die in *curfu diligentia*.

A HORNING whereupon denunciation followed during the rebel's life, may be registred after his decease, and escheat may fall upon it. Durie, 20th December 1626, Ld. Ley *contra* Blair's relict.

Judicial deeds after the judge's death or removal.

AFTER the decease of the judge and clerk, the succeeding clerk may extract any act out of the court-books, which was registred before, and there needs no transumpt nor warrant to add force thereto. Durie, 9th March 1627, Stewart *contra* Fleming. --- An exception of lawful poinding was sustained to elide an action of spuilzie, altho' the sheriff, who directed the precept of poinding, was now two years out of office, and another in his place, in which case the Lords found no necessity to put the lieges to the charges of a new precept. Durie, Spottiswood, (*Sheriff*) 22d January 1629, Masterton *contra* Robertson. --- A nullity objected to a poinding was repelled, *sciz.* That the bill and protest were registred, when the baillie principal of the bailliary was dead, and the commission to the baillie-depute or substitute had fallen by the death of the baillie-principal. 18th February 1732, Hunter *contra* Montgomery.

Order of redemption.

AN order of redemption used against the father, was found sufficient after his death, as a foundation of a declarator of redemption against the apparent heir, without necessity of a new order. Durie, 11th December 1638, Finlayson *contra* Weemyss.

APPRISING and arrestment fall not by the common debtor's death. See Adjudication. See Arrestment.

CONFIRMATION may be after the disponent's death. See Confirmation.

DEATH-BED.

THE law of death-bed protects every sort of heir, male or of tailzie, as well as heir of line; those who are heirs in personal rights, as well as those who succeed to infeftments. *Stair, 25th February 1663, Hepburn contra Hepburn.*---- Death-bed takes place in favours of all sorts of heirs, whether the destination be by infeftment, or only in a personal deed. *Home, 26th January 1726, Marquis of Clydsdale contra Earl of Dundonald. Stair, 4th July 1672, Porterfield contra Cant.*

ONE having become bound in his contract of marriage to provide a certain sum, and also the conquest during the marriage, to himself and spouse in conjunct-fee, and to the children to be procreate of the marriage in fee, did purchase an estate during the marriage, taking the rights thereof to himself, his heirs and assignies, and upon death-bed did execute a deed, settling both heritable and moveable estate upon his eldest son, with the burden of certain provisions in favours of the younger children; in a reduction of this settlement, at the instance of the younger children, upon the head of death-bed, the Lords were unanimous, That seeing there was no actual settlement of the conquest, in terms of this obligation, to constitute the children heirs of provision; they had not the privilege of death-bed; that they were constituted creditors by this obligation, and in whatever way a service in general as heir of provision or conquest may have crept into our practice, it is, strictly speaking, inept; such a thing, while the father is alive, cannot be, and if he dies without implementing, the obligation is purified in favours of the children, and they have a direct action against their father's representatives to make over the conquest in their favours. *16th December 1738, Campbells contra Campbells.*---- In a similar case, where one was bound in his contract of marriage, to provide the conquest to himself and children of the marriage, and where he having granted a rational provision to his second wife, and the same objected to by the children of the first marriage, not as inconsistent with the clause of conquest, because, by such a clause, a father is not bound up from doing rational deeds, but upon this footing, That it was upon death-bed, and reducible by them as heirs of provision; the Lords sustained the provision so far as the dead's part did extend, seeing it could not prejudice the childrens legitim. *Stair, 16th, Dirleton, 20th June 1676, Mitchel contra children of Littlejohn.*---- Upon the same footing, where one is bound in his contract of marriage to provide a definite sum to the children of the marriage, he may exerce his implied power of division upon death-bed. *Forbes, 19th July 1706, Edmondston*

contra Edmonston. ---- One who was bound in his contract of marriage to provide the conquest to the heirs of the marriage, having granted a legacy upon death-bed of 500 merks to a stranger; the Lords found, That the clause of conquest in the contract of marriage did hinder the father to dispose of his moveable estate upon death-bed; but as this was a deed neither onerous nor rational, the clause of conquest would have struck against it, tho' the testament had been executed in *liege poustie*; and therefore is not contrary to the above decision, finding, That the father may do rational deeds upon death-bed. Home, February 1722, Maxwel *contra* Neilson of Barncailly.

Competent
to the remoter
heir, after the
immediate ap-
parent heir's
decease.

The Lords found, That a disposition made *in lecto*, may be reduced, not only at the instance of the apparent heir living at the time, but, he dying, at the instance of the heir who succeeds him. Stair, 21st January 1668, Schaw *contra* Calderwood. Gosford, Stair, 16th July 1672, Gray *contra* Gray. ---- One upon death-bed having disposed his estate to his infant son, and the heirs of his body, which failing, to certain extraneous substitutes, and the son his only child having died without issue, in a reduction, at the instance of the next heir, it was objected, That the privilege of death-bed is not competent to a remoter apparent heir, where the apparent heir for the time is not lesed. The Lords repelled the objection, and sustained the action at the instance of the remoter heir. Home, 13th July 1722, Kennedy *contra* Arbuthnot. ---- A disposition being granted on death-bed to certain trustees, *for the behoof of the disponent's only daughter, her heirs and assignies, in case she live to be married, or attain to the age of 21 years, which of them shall first happen, but in case of her decease before that time, for behoof of the poor of the maltmen-calling in Glasgow*; and the daughter having died before her majority or marriage, in a reduction, at the instance of the next heir, the Lords found the disposition was not only in prejudice of the remoter heir, but also in prejudice of the nearest heir at the time, she being an infant, and the estate being upon her failure, even in infancy, provided to strangers, and therefore reducible *ex capite lecti*. 13th February 1739, Craigs *contra* magistrates and malsters of Glasgow.

Competent
also to the
wife and chil-
dren.

A MAN upon death-bed cannot gift away his lying money, further than his own half or third thereof. Durie, 15th March 1634, Brown *contra* Thomson. ---- An assignation to moveables on death-bed, was found valid, where the cedent had neither wife nor children to quarrel the same, as done to their prejudice. Falconer, 15th March 1683, Sandilands *contra* Sandilands. ---- The wife and children cannot be prejudged by any deed on death-bed, more than the heir. Stair, 16th June 1676, Mitchel *contra* children of Littlejohn. Fountainhall, 29th, January 1679, Aikman *contra* relict of Boyd. ---- This found with respect to the wife's third of moveables. Durie, 10th July 1628, Cant *contra* Edgar. ---- Sums lent out upon heritable security, by a person in *lecto aegritudinis*, do not prejudice his relict and children. Marcus, (*Executry*) March 1683, Mr. James Henderfon *contra* Saughtonhall.

If competent
to the defunct's
creditors.

A REDUCTION upon the head of death-bed, is competent to the defunct's personal creditors, for he can no more prejudice them by any deed

deed done on death-bed, than he can prejudge his apparent heir. Stair, 25th November 1669, creditors of Cowper *contra* Lady Cowper. --- The contrary found, in respect that death-bed is a privilege competent to the heir only, or those in his right. Dalrymple, 24th June 1714, creditors of Lindsay competing.

AN assignation being quarrelled as done on death-bed, the exception was not received, being proponed by the debtor, altho' the bond assigned was heretable; and he alledged, He was not in *tuto* to pay to any except the heir, seeing the Lords ordained the assigney to find caution, to warrant the debtor at the heir's hands. Durie, 12th July 1626, Ld. Craigie Wallace *contra* Wallace. --- Found it not competent for debtors to object to an assignation granted upon death-bed, by a defunct to his wife, of certain sums, both heretable and moveable, as being in prejudice of the heir and executor, when they themselves did not quarrel the same. Durie, 16th February 1628, Robertson *contra* debtors.

Death-bed-deed effectual, and gives a *ius exigendi*, unless challenged by the heir.

THE law of death-bed strikes at moveable bonds as well as heretage, since for these also the heretage may be comprised, and so the heir prejudged. Durie, 7th January 1624, Shaw *contra* Gray. --- Bonds granted on death-bed, altho' they do affect only the dead's part, yet they are preferable to legacies left in the ordinary way, for the defunct is in *legitima potestate*, as to the affecting his part, and granting of bonds to that effect. Stair, Dirleton, 14th December 1676, Mitchel *contra* Littlejohn. --- The Lords refused to sustain a deed on death-bed, disposing on moveables, in *quantum* prejudicial to the heir's relief of moveable debts. Falconer, 27th February 1683, Earl of Leven *contra* Montgomery. --- Bond secluding executors, cannot be disposed of upon death-bed. Home, 12th January 1725, Mackay *contra* Robertson; Marcus, (*Letis ægritudinis*) 20th July 1688, Pringle *contra* Pringle. --- A tack cannot be disposed on death-bed, in prejudice of the heir. Hope, (*Heir*) 10th March 1621, Dunlop *contra* Dunlop.

Against what deeds it strikes.

A WOMAN upon death-bed granted a disposition to one of her sister's, excluding another who had a right to come in as heir-portioner; the Lords repelled the alledgeance, That the alienation was *intra familiam*, and found the reduction on the head of death-bed relevant. 26th January 1727, Adams *contra* Thomson.

Where the disposition is *intra familiam*.

FOUND, That a father on death-bed cannot make any provision in favours of his children, altho' unprovided, which might burden the heir with payment thereof, and that the maxim was universal for all, as well children as strangers; Durie, 1st July 1637, Lord Cranston Riddel *contra* Richardson. Home, July 1721, Foulis of Collington *contra* his sisters.

Bonds of provision to children.

HUSBANDS in *leſto* are not hindred to give liferents to their wives, otherways unprovided. Stair, 23d February 1665, Jack *contra* Pollock. --- But they cannot go above the value of the legal teirce. Stair, Dirleton. 21st January 1668, Schaw *contra* Calderwood. --- A father upon death-bed, disposed his estate to his daughter, who was his only child, and her husband in conjunct fee and liferent, &c. This disposition

Liferent in favours of a wife or husband.

fiction being quarrelled by a remoter heir after the daughter's death, as to the husband's interest therein; it was argued for the husband, That the disposition, tho' upon death-bed, must be sustained for his liferent, upon this consideration, That had it not been for the death-bed-deed, he would not have failed to infest his wife as heir to the defunct, whereupon his liferent would have arisen to him by the courtesy of Scotland; and therefore, since the husband craves nothing by the death-bed-deed but what he would have had, tho' it had never been granted, the liferent ought to be sustained, since the heir suffers nothing thereby, and, in so far as the liferent reaches, was not lesed by the death-bed-deed; which was sustained. Gosford, 16th, Stair, 25th July 1672, Gray *contra* Gray.

Deeds in fa-
vours of credi-
tors.

FOUND; That, conform to the *leges burgorum*, a burges may alienate lands on death-bed, for payment of his debts contracted prior thereto; but that, in this case, the heir must be first required to pay the said debts, and to maintain the clinique *in lecto*. Maitland, 26th March 1568, Anderson *contra* Anderson. ---- A moveable bond sustained to an apothecary for prices of drugs furnished. Durie, 7th January 1624, Schaw *contra* Gray. The like. Fountainhall, 27th July 1678, Heriot *contra* Lyon. ---- A bond was sustained, tho' granted on death-bed, being for goods furnished. Durie, 13th July 1632, Pollocks *contra* Fairholm. ---- But, in the same cause, the Lords repelled another alledgeance, That another bond by the same clinique, was for furnishing made to his father; for which they refused to sustain the bond, except it were alledged, That the defunct was heir or executor to his father, whereby law would have obliged him to pay the sums. Durie, *ibid.* ---- A disposition being quarrelled as upon death-bed, the dispoinee alledged onerous causes, and condescended, That he was creditor to the defunct by a clause of Warrantice; the Lords sustained the disposition as a security of the clause of Warrantice; but, that the lands disposed upon death-bed might not be perpetually burdened with that relief, they restricted the same to distresses occurring within seven years. Stair, Gosford, 1st February 1676, Lawrie *contra* Drummond. ---- An heretable bond being granted on death-bed, in corroboration of a prior bond for the same sum, which prior one carried no obligation to grant a further security; the Lords, in a competition betwixt an adjudger and this infester, considered, That, tho' such a bond would not subsist against an inhibitor, unless there had been a previous special obligation to grant it; yet that such privilege was not competent to the heir, or to his creditor, and therefore preferred the annualrenter. Forbes, 18th, Fountainhall, 19th January 1709, Hay *contra* Darling. ---- A party who by contract of marriage was bound to provide the children thereof in a certain sum, having granted a bond of provision on death-bed to one of them, for a sum something less than the due proportion, but making no mention therein of the said contract of marriage; the Lords here repelled the defence of death-bed, and sustained the bond of provision. Forbes, 19th, Fountainhall, 20th July 1706, Edmonston *contra* Edmonston.

A SALE of lands, tho' for a reasonable price, reduced *ex capite le-
Sale of lands. sti.* Durie, *penult.*, July 1635, Richardson *contra* Sinclair.

A TACK

A TACK for three nineteen years of the granter's whole estate, done upon death-bed, tho' alledged to be for an adequate rent, was reduced; it being pled, That tho' a tack for a moderate endurance, granted upon death-bed, may subsist, as being an act of ordinary administration, a tack for three nineteen years is a *species* of alienation, which cannot be granted upon death-bed. December 1733; Chrystifons *contra* Ker. Tack granted on death-bed.

THE law of death-bed protects the heir, not only against alienations, but was found effectual against the superior, insisting in a declarator of recognition, upon an alienation made upon death-bed. Stair, 20th July 1669, Barclay *contra* Barclay. Death-bed-deed, if it will infer recognition against the heir.

A TUTOR named in a testament, with this quality, That he should only be liable for actual intromission, was not found to have the benefit of this quality from the act 1696, unless the testament was made in *liege poustie*. Forbes, MS. 28th January 1714, Watfon *contra* Watfon. Nomination of tutors.

A MAN disposing his estate to his heir, with a reserved faculty to burden it with a certain sum; the burden was sustained against the heir, tho' the faculty was exercised upon death-bed. Stair, 28th June 1662, Hay *contra* Seaton.--- In a destination of succession, in favours of heirs-male, there was a clause bearing, *That it should be leisom to the said Thomas at any time, during his life, to alter the same.* This was found not to validate an alteration upon death-bed, tho' in favours of the heir of line. Stair, 25th February 1663, Hepburn *contra* Hepburn.--- A father disposed his estate to his eldest son, reserving power *at any time, during his life*, to burden it with a certain sum; this power he exercised upon death-bed, which was found good against the disponent, who was heir, seeing he had accepted and bruiked by the disposition; reserving this power, to burden *at any time during his life*, which includes also death-bed. Stair, Gosford, 22d June 1670, Douglass *contra* Douglass. The like. Gosford, 16th December 1668, Bryson *contra* Bryson.--- A man in *liege poustie*, having subscribed a disposition in favours of one not *alioque successurus*, and intrusted the same to a third party to be redelivered to him upon demand, and in case of his death to be given up to the disponent; he recalled the said disposition on death-bed, and in place thereof made out two dispositions, the one in favours of his heir of line, of the one half of the subject, the other in favours of another relation of the other half. The Lords sustained all this, tho' done upon death-bed, because the first disposition, not being a delivered evident, was absolutely in his power; and since he recalled it *ad hunc effectum*, to give his heir of line the one half of the subject, the heir who was benefited thereby could not quarrel the same. Stair, Gosford, 25th January 1677, Ker *contra* Kers.--- A person having tailzied his estate to a stranger, with this provision, That the disponent should be bound to pay all his debts contracted, or to be contracted, and that should be due at his decease, but without the clause, *Etiam in articulo mortis*; and having thereafter granted a bond upon death-bed, the Lords found, That the disponent, was burdened with the said quality in the disposition; and therefore, that he could not reduce the bond as granted on death-bed. Reserved faculties, if exercisable upon death-bed.

Home, 2d December 1685, Brown *contra* Congleton. ----- A person having disposed his estate to the second son of a family, being a stranger, with a power to alter, and with the burden of all debts and obligations he should adject at any time in his life, and having ordained him on death-bed, by a writ under his hand, to marry a certain Gentlewoman, otherways to lose the estate, and neglecting to provide it to another in this event (whereby it would become caducary, and belong to the king) and he being required to marry, by way of instrument, and refusing, whereupon a declarator of his amitting the estate was raised; tho' this reserved faculty virtually contained a disposal of heretage on death-bed, and also was *contra libertatem matrimonii*; yet the Lords found, That the disposer might, *etiam in lecto*, burden his disposition with what qualities and conditions he pleased. Fountainhall, 3d February 1687, and 25th January 1688, Hepburn of Keith *contra* old Lady Keith and Jane Cockburn. ----- Davidson having acquired some lands to himself in liferent, and his eldest son in fee, reserving to himself power to alter and innovate at any time in his life, *etiam in articulo mortis*; and having, by virtue of the reserved faculty, made a new disposition in favours of his second son; the eldest raised reduction thereof *ex capite lecti*. Alledged for the defender, This privilege is only competent to an heir, and the pursuer cannot insist in quality of heir. *1mo*. Because, the father was never fiar of the lands. *2do*. Because the pursuer's disposition and infestment gave him a right to the lands *qua* disponee, but must for ever exclude him from making up a title in quality of heir. To the first answered, The father was in effect fiar by the reserved faculty. To the second, The pursuer's infestment, taken in his name when a child, cannot debar him from pleading in his natural quality of heir. The Lords reduced the second disposition. Fountainhall, Marcus, (*Lectus ægritudinis*) 24th November 1687, Davidson *contra* Davidson. But thereafter the interlocutor was stop'd, and an act before answer pronounced for trying if the second disposition was made in *liege poustie*, or in *lecto*; and if the disposer was *sana mentis* at the granting thereof. Upon which the matter was settled by a transaction. Fountainhall, 3d December 1687, Marcus, (*Lectus ægritudinis*) February 1688, *inter eosdem*. ----- A father having disposed his estate to his son, with the burden of all provisions to his younger children, granted, or to be granted; and thereafter, upon death-bed, having granted a bond of provision to one of his daughters, the Lords found this bond not reducible *ex capite lecti*, by the heir, who had accepted the foresaid disposition, and behoved to be liable to the burdens and qualities thereof. Fountainhall, Forbes, 8th February 1706, Bertram *contra* Wier. ---- A party having made a tailzie in favours of some others, failing heirs of his own body, but bearing this reserved faculty, *That it should be lawful to him at any time, during his lifetime, to alter the said tailzie*; which *de facto* he so far did, as to make a new tailzie, only this last being done on death-bed; the Lords found, That the granter might on death-bed recal and annul the first tailzie, tho' this faculty bore no more but the words, *At any time in his life*, and wanted the clause, *Etiam in articulo mortis*; judging, That these words at any time during his life, were opposed to death, not to sickness. Fountainhall, 25th February, Fountainhall and Dalrymple, 31st December 1707. Forbes, 23d January 1708, Livingston *contra* Menzies.

A DISPOSITION executed in *liege poustie*, but blank as to the dis-
 sponsee's name, found reducible as upon death-bed, seeing the disponsee's
 name was filled up upon death-bed. Fountainhall, 18th January 1687,
 Pennicuik *contra* Thomson. The like. Stair, 22d June 1678, Bir-
 nies *contra* Ld. Polmais.

Blank filled
 up upon death-
 bed.

A MAN being *obæratuſ*, and thereby forced to ſell part of his lands,
 yet fearing men ſhould ſcruple to deal with him, becauſe he was kept
 bedfaſt with the gout, made ſupplication to the Lords to direct
 ſome of their number to viſit him, and try his condition; which being
 done, and they reporting, That, altho' he could not uſe his limbs, yet
 that it was a lingering infirmity, and his memory and judgment entire;
 the Lords declared, That the alienation to be made by him ſhould not be
 reducible *ex capite lecti*. Haddington, 3d December 1608, Gilbert ſup-
 plicant. --- Found, That a husband, twelve or thirteen days before his
 deceaſe, being ſick of a fever and flux, and not coming to kirk or mer-
 cat thereafter, could not infeſt his wife in a liferent. Durie, 1ſt Febru-
 ary 1622, Robertſon *contra* Fleming. --- A moveable bond, grant-
 ed ſeven weeks before the party's deceaſe, but ſhe being ſick at the time,
 tho' not of a *morbū fonticuſ*, and not coming thereafter to kirk and
 mercat, was reduced *ex capite lecti*. Durie, 7th January 1624, Schaw
contra Gray. --- A ſale of lands made by a perſon paralitick a year be-
 fore his death, and while he was found in judgment and underſtanding,
 and in the conſtant exerciſe of managing all his affairs, was yet found re-
 ducible *ex capite lecti*, unleſs he had come abroad after it. Durie, *penult.*
 July 1635, Richardson and Lord Cranſton *contra* Sinclair. --- In a
 reduction upon death-bed, it was offered to be proved by the defender,
 That tho' the deſunct was confined to the houſe, having broke his leg,
 ſo that he could not go to kirk or mercat, that he was, notwithstanding,
 in perfect health when he granted the bond; which was repelled.
 Stair, 25th February 1668, Dun *contra* Duns. --- A running ſore
 was found to be a diſeaſe, whereof one may die as well as of ſickneſs;
 and therefore ſufficient to ſubject a perſon in that ſituation to the law
 of death-bed. Fountainhall, 20th February 1694, Lady Scottſoun
contra Drummond. --- A party having by a Rheumatism contracted a
 lump on his back, which diſlocated two of his *vertebræ*, ſo that he
 kept his bed, and could not walk ſo much as on crutches; and having
 granted bonds in that condition, the laſt of which was, nevertheleſs,
 more than three years before his death; the Lords thought it hard to
 fix a death-bed ſo far back, and that it ought not to exceed a year, and the
 party having died of a fever, that the immediate, not the remote cauſe
 of his death, was here to be conſidered; and therefore, they found
 death-bed not proved in this caſe, and aſſoiled from the reduction of
 the bonds. Fountainhall, 11th June 1696, Gordon *contra* Gordon.

What cir-
 cumſtances in-
 fer death-beds

A DISPOSITION was found to be *in lecto*, becauſe, tho' the party
 went to kirk and mercat, yet he was ſupported. Auchinleck (*Dispo-*
ſition) 7th July 1629, Maxwel *contra* Fairly. --- The deſunct having
 gone ſeveral times to the mercat, and walked there unſupported, and
 other times abroad, after the diſpoſition challenged, ſometimes a-foot,
 and ſometimes on horſeback, this was found relevant to elide the rea-
 ſons of reduction on death-bed, notwithstanding of his being helped up
 and down ſtairs, and to and from his horſe, and by leading his bridle,

Reconſe-
 ſence by go-
 ing to kirk of
 mercat.

and that notwithstanding he continued sickly till his death. Stair, 26th February 1669, Pargillies *contra* Pargillies. ---- It is not necessary to prove, that the defunct went both to kirk and mercat unsupported, either is sufficient. Stair, 28th June 1671, creditors of Balmerino *contra* Lady Coupar. ---- Going free to the mercat, must include the going free to the mercat-place, and returning back from the same not being supported any part of the way. Stair, Gosford, *Ibid.* ---- In a reduction upon the head of death-bed, several witnesses deponed, That the defunct went vigorously to his coach, in which he was carried to church, and all the way unsupported; one witness deponed, That in going down stairs the defunct leaned his hand upon a man's shoulder; another deponed, That he staggered as he went through the close, and was supported by the deponent. The Lords found the deed was done on death-bed, and that the positive probation of supported, tho' by single witnesses, was more pregnant than the negative of unsupported; and they thought the exercising acts of health and strength for validating rights, by the help of coaches or sedans, are suspicious circumstances, which the party would have avoided had he been able. Marcus, (*Lectus agritudinis*) January 1685, Ld. Lufs *contra* Carden. ---- Two witnesses deponing, That the person alledged sick, was supported when he went to kirk or mercat, was found to make a full probation, altho' many witnesses deponed *negative*, that they did not see him supported; and found, that domestick deeds were not to be regarded for proving convalescence. Stair, 5th, Gosford, 12th December, 1672, Cleland *contra* Cleland. Stair, 9th January 1673, Nicol *contra* Johnston.

Other circumstances to infer reconvalence, equivalent to going to kirk or mercat.

IN a proof of death-bed, it was found, That the defunct's private way of going abroad, tho' unsupported, was not equivalent to his going to kirk and mercat. Stair, 7th February 1671, Laurie *contra* Drummond. ---- In a question of death-bed, it being proved, That the defunct himself constantly put on his own clothes, walked up and down his house, convey'd strangers to their chambers, freely without help or support, and in the same manner went down with others to see them take horse, made several accompts and bargains, and frequently play'd at cards: All this was not found relevant to infer health, or equivalent to the going to kirk and mercat. Stair, Gosford, 28th June 1671, creditors of Balmerino *contra* Lady Coupar. ---- In a reduction *ex capite lecti*, it being proved, That at the date of the disposition, the granter had a gout and palsy, of which he never recovered, but that he walked unsupported about his doors after the date of the deed, and managed his business discreetly, and that, at two different times, he rode several miles from his own house, and made bargains; yet all this was not found equivalent to his going to kirk and mercat; it being pled, That equipollent acts are not to be sustained, unless having the essential qualities of being at kirk and mercat, *viz.* performed before many indifferent witnesses. Marcus, (*Lectus agritudinis*) February 1683, younger daughters of Mountainhall *contra* the eldest. ---- In the reduction of a disposition of some heritable sums made by a quaker *ex capite lecti*, the Lords sustained the following qualifications sufficient to elide the reasons of death-bed, That the disponent had, several weeks after the disposition, sitten in his shop, and sold his goods, and that he had walked before his shop-door, and bought a suit of clothes

clothes in the next shop, seeing, he being a quaker, was not obliged to go to church to ratify his deed. *Harcus, (Lectus ægritudinis)*

February 1683, *William Livingston contra Janet Goodale*.---- In a reduction *ex capite lecti*, the Lords refused to sustain the following acts as equipollent to the party's going to kirk and mercat, *viz.* That he, after the disposition, came down a very rugged way near Stirling, without help, and there took coach, and travelled four miles to Alloway, where he died. *Fountainhall, Harcus, (Lectus ægritudinis)* 25th November 1687, *Keirie contra Craigengelt*.---- The following acts to prove reconvalescence sustained equivalent to going to kirk and mercat, *viz.* going from Edinburgh to Inverkeithing, to assist at the election of a commissioner to the parliament, spending the whole day in a boat at sea in the way of diversion, walking in the Lady Home's yards, and visiting prisoners in the tolbooth. *Fountainhall, 21st February 1694, Tilliheven contra Innermaith.*

In a reduction upon the head of death-bed, it having come out in the proof, That the defunct, after granting the disposition quarrelled, had come in to Edinburgh from his country seat, some few miles distant, went to the cross publickly betwixt twelve and one, and walked there half an hour unsupported, conversing with people of business and others: It was objected, That the cross of Edinburgh is no mercat-place. The Lords found, That the defunct was at the mercat-cross of Edinburgh, in mercat time of day, and walked there a considerable time unsupported, and therefore repelled the reason of reduction. 29th July 1736, *Earl Roseberry contra his sisters.*

Going to the cross of Edinburgh.

In a reduction upon death-bed, it is not necessary to condescend upon a particular disease. *Stair, Gosford, 28th June 1671, creditors of Balmerino contra Lady Coupar.*

The particular disease need not be libelled.

A MAN having been many months ill of a *Tympanites*, and, while under the disease, having signed a disposition, after which he did not live 60 days, but died of the same disease, yet went unsupported to kirk and mercat after granting the writ; the Lords finding the going to kirk and mercat clearly proved, sustained the disposition, and assoilzied from the reduction *ex capite lecti*. *Fountainhall, 5th December 1711, Crawford contra Brichen.*

Act 4th, Parl, 1696.

A MAN upon death-bed disposed his estate to his daughter (apparent heir) and her husband in conjunct-fee, which failing, to her husband's heir; the daughter and her husband bruiked the subject several years, and never reclaimed or raised any process against this death-bed-deed; yet this possession of the apparent heir, being under the influence of her husband, was not found an homologation to debar a posterior apparent heir from quarrelling the same. *Stair, 16th July 1672, Gray contra Gray*.---- A man having made a disposition on death-bed in favours of his heir, and failing of him to strangers, after the heir's death, the same was quarrelled by the next apparent heir, who contended, That the law of death-bed was introduced, for securing not only the immediate apparent heir, but the whole heirs indefinitely. Answered, The consent of the immediate apparent heir has ever been held sufficient to bar any other heir from quarrelling; and here the deed

Apparent heir's consent.

deed being in favours of the immediate apparent heir, must be held equivalent to his consent. The Lords considered, if the son, who was institute, had been of age, accepted and entred to possession, there might have been some doubt how far the remoter heir could be permitted to challenge; but the institute here being an infant, and who outlived his father but a short time, they sustained the remoter heir's interest and title to pursue this reduction. Fountainhall, 25th December 1696, *Power contra Deans*.---- An heir-portioner, in her contract of marriage, having accepted a provision, in lieu of all she could ask or crave through her father's decease, as this did not bar her from succeeding as heir *ab intestato*, so the father, having disposed an heritable subject upon death-bed, it was not found to bar her from quarrelling the same, tho' it was pled to be equivalent to a consent to the death-bed-deed; for the difference is great betwixt impowering one antecedently to do a deed, which the law condemns as wrong, and acquiescing in it after it is done. 13th November 1728, *Reids contra Campbell*.---- A person in *liege poustie* took an obligation in writing from his presumptive heir, *not to quarrel or impung, on the head of death-bed, any deed or settlement which he should make, but, on the contrary, to ratify and approve the same*; In a reduction *ex capite lecti*, at the instance of this presumptive heir, of a death-bed-deed granted by the predecessor in his prejudice, the said obligation was objected to him by way of defence, and the maxim urged, *unicuique licet favori pro se introducto renunciare*. It was answered, *imo*, The law of death-bed was introduced for a protection to dying persons, to guard them from the artifices of cunning men; for if the heir's interest were only concerned, this consideration would extend to alienations in *liege poustie*, as well as upon death-bed. *2do*, The heir is not at liberty to refuse his consent in such a case; and if *metus carceris* be a good ground for avoiding an obligation, *metus exheredationis* is much stronger. The Lords repelled the defence, and found this antecedent consent not sufficient to bar the heir from quarrelling the death-bed-deed. 4th December 1733, *Inglis contra Hamilton, alias Inglis of Murdiston*.

GRANTER'S RATIFICATION upon oath of deeds on death-bed, made by the grantor, hinders not the heir to quarrel the same. Falconer, 27th February 1683, *Earl of Leven contra Montgomery*.

EFFECT OF REDUCTION upon the head of death-bed takes only place in time coming, and not *quoad* bygone fruits and annualrents intromitted with by the disponent. Fountainhall, 11th December 1677, *Lockhart contra legatars of Lockhart his brother*.

ONE UNDER SENTENCE OF DEATH. AN obligation granted by a man under sentence of death, was found no better than one granted on death-bed. Haddington, Cant *contra Rae*.---- The like. *Harcus, (Summons)* March 1685, *Hary Graham contra Douglasses*.

NO recourse upon a death-bed-deed against the dead's part. See *Quod potuit non fecit*.

THE

THE heir's personal creditors, if intitled to insist in a reduction upon the head of death-bed. See Personal and Transmissible.

DEEDS on death-bed, how far probative. See Proof.

DEBITOR and CREDITOR.

CO-DEBITORS bound conjunctly and severally, whether as co-principals or co-cautioners, if any one pay the debt, he is intitled to relief off the rest, *quia de jure inest*. Stair, 19th June 1662, Wallace *contra* Forbes. Stair, 28th June 1665, Monteith *contra* Anderson. Dirleton, 12th December 1665, Ferguson *contra* Moir. Stair, Dirleton, 27th January 1675, Monteith *contra* Rodger. Gosford, 5th July 1677, M'Millan *contra* Smillie.

Relief among co-debitors, and if the creditor, upon payment, is bound to assign, in order to operate relief.

A CAUTIONER, upon payment, craving assignation against his co-cautioner, the Lords found the creditor not obliged to assign, the cautioner being sufficiently secured in law by his action for relief. Newbyth, Stair, 10th July 1666, Home *contra* Crawford. Fountainhall, ult. December 1697, Rae *contra* Panton. --- Tho' some creditors, when getting payment from cautioners, are so scrupulous, that they will not grant an assignation, and to which they cannot be forced by law; yet a discharge to a cautioner operates the same effect, *quoad* his Relief, that an assignation would do, except as to a summary charge and present execution. Fountainhall, 12th December 1695, Wood *contra* Gordon. --- A cautioner in a suspension being distressed on a decret, may demand assignation, not only against the principal for whom he was cautioner, but against the whole cautioners in the original bond. Gosford, 7th November 1676, Rigg *contra* cautioners of Broomhall. --- A personal creditor adjudging, tho' he be bound to accept of payment from another personal creditor, yet cannot be forced to grant an assignation, but a discharge only: But here the Lords declared, that they would take into consideration how far the refusal should cut off the accumulations. Fountainhall, 14th February 1702, Hay *contra* Tweedie.

A BOND granted by a principal and two cautioners, being assign'd only in so far as might be extended against the principal debtor and one of the cautioners; action of relief of the half thereof, was found competent to the distressed cautioner against his co-cautioner, notwithstanding the restriction of the assignation, which screen'd him only from the direct action at the assigney's instance, but could not evacuate the implied obligation of relief among cautioners. Forbes, 12th, Fountainhall, 27th February 1712, Scot *contra* Dutche's of Buccleugh.

ALTHO' an annualrenter may distress any part of a tenement affected, for the whole annualrent, yet the Lords found, That the heritor of that part might seek his relief off the rest of the lands affected, and off the heritor thereof, *pro rata*; and this, both for bygones already paid, and for all years to come. Durie, 26th June 1635, Grieve *contra* Hepburn. Stair, 22d June 1671, Lord Balmerino *contra* Hamilton. --- An annualrent being payable out of two tenements, which

came afterwards into the hands of two different singular successors, it was found, That the annual renter might uplift the whole out of any one of the tenements, assigning against the other for relief. Stair, 26th June 1662, Adamson *contra* Lord Balmerino.---- The like. Fountainhall, 25th November 1708, *inter eosdem*.

A MAGISTRATE upon his negligence in suffering a debtor to escape out of prison, being condemned to pay the debt, has no recourse against the cautioners, whether he obtain from the creditor a discharge only, or be assigned to the debt, because he is liable *ex delicto*, and comes in place of the principal debtor. Stair, Dirleton, 24th January 1668, magistrates of *contra* Earl Findlater.---- The like found with regard to a granter of a bond of presentation, who having paid the debt, upon failing to present the person of the debtor, and taken an assignation, was not found entitled to relief against the cautioners in the original bond. February 1731, Graham *contra* Little.---- Yet two persons being found liable *in solidum* to pay a fine, the Lords decerned the creditor, upon payment by one, to assign against the other for the one half, because otherways the law does not furnish relief betwixt *correi* who are liable *ex delicto*. Fountainhall, 15th July 1680, Anderson *contra* Blackwall and Stirling.

Two parties granting a bond, and thereafter one of them granting a bond of corroboration, mentioning the former as granted by them two, but no mention which was principal which cautioner, and the the heir of the debtor of the bond of corroboration being pursued thereupon, the original bond, to which it related, being amissing, the Lords, in respect of the creditor's negligence in losing the first bond, whereby the defender was cut out of his recourse against the heirs of the other obligant, assolized the defender from the one half of the debt, and declared, if he would burden himself with the proof, that he was only cautioner, they would assolzie him from the whole. Forbes, 23d, Fountainhall, 24th July 1708, creditors of Nicolson *contra* Earl Balcarras.

A preferable creditor can do no arbitrary deed to prefer one secondary creditor to another.

A PARTY having granted an heritable security on his estate to his brother, for his relief of what debts he was then owing him, and of all others he should be resting him thereafter; the Lords found, That other creditors having thereafter adjudged, the brother could not, posterior to the adjudications, acquire any debts due by the common debtor, in prejudice of the adjudgers. Bruce's, MS. 25th July 1716, Menzies *contra* Clark.

Therefore if he take his payment out of one subject he is bound to assign to the postponed creditor in order to operate relief.

A LIFERENTRIX, by annuity, being infest in two separate subjects, one of which was also affected by a second infestment, the Lords declared they would ordain the liferentrix, either to assign her right upon payment, or to do diligence first against that subject in which the secondary creditor had no interest. Fountainhall, 1st February 1693, Lady Gunsgreen *contra* Lauder.---- In a competition, an adjudger, subjected to an inhibition, offering to purge, by payment of the debt, the creditor was found obliged to assign his inhibition, but not in so far as it might be prejudicial to other debts in his person. Stair, 19th July 1672, Chiesly *contra* Hay.---- The like. Stair, Gosford, 11th February 1676, Bruce *contra* Mitchel.---- A creditor being preferable over two tenements, and a secondary creditor having a right only over one

one of them, in that situation the preferable creditor, for a separate debt, adjudged both tenements; it was found, That the catholic creditor was not obliged to dispoise to the secondary creditor in prejudice of his adjudication existing before the date of the process. Stair, 6th November 1678, Miln *contra* Hay.----In a competition betwixt a liferentrix, whose infestment reached over half of the subject, and a creditor, whose infestment affected the whole, and was prior to that of the liferentrix, and who had also an adjudication, but posterior to the liferent-right; she craving, that he might be decerned to assign her as to one half, in regard the other was sufficient to pay him his annualrent; the Lords thought, That if he acquired any such adjudication less preferable *post litem motam*, he might be reputed *in mala fide* to make use of such right to impede his assigning to the liferentrix, but if he had got it before, then there was no law hindring him to do the same, and to cover it by his better right; and so the Lords refused to decern him to assign the liferentrix against the other half in prejudice of his adjudication. Fountainhall, 3d January 1696, Scotland *contra* Bairdner.----An assignation to some goods, by a bankrupt to his creditor, in security and payment, being reduced, upon the act 1696, by another creditor, and the reducer at the same time arresting in the assigney's hands, and pursuing a furthcoming; the assigney was contented to make the goods furthcoming, but craved assignation from the pursuer to his cumulative security by adjudication, in so far as he should pay, that so he might operate his relief out of the common debtor's effects *pro tanto*; the Lords found this relevant, and ordained the pursuer to assign, but with this express quality, That the pursuer should be preferred *quoad* his debt, and the assigney should not compete with him for the same. Fountainhall, Forbes, 19th December 1705, Reid *contra* Man.----A party having two infestments of annualrent, one prior, and another posterior to the infestment of another creditor, whose infestment was only of a part of the lands, he who had the first and third, being infest in the whole, and taking up his annualrent out of that part only wherein the other stood infest, whereby that other was disappointed; and therefore, craved in a process to be assigned to a proportion, &c. The Lords found, That where a posterior creditor pays a prior out of his own money, he has a title to demand assignation; but if he leaves him to get his payment out of the debtor's means, the catholic creditor is not obliged to assign, but with a quality and reservation, that it shall not prejudice his other debts and rights, tho' posterior to the party's right who craves the assignation. Fountainhall, Forbes, 21st December 1710, Pitcairn *contra* Haliday.----Brigadeer Preston, purchaser of the estate of Valleyfield at a publick roup, offered to the Lords a scheme for drawing the price, wherein it appeared, That he had right to some debts preferable over the whole estate, and to others preferable over particular parcels; and pretending to exhaust the remanent price of the separate parcels affected by his catholic debts, in order to bring in the other debts purchased by him, preferable, as said is, upon particular parcels. This was opposed by colonel Erskine, who alledged, That the catholic debts, preferable upon the whole estate, ought to be taken out of the whole head of the price, whereby the price of every particular parcel of the estate would be diminished proportionally; and he, the colonel, of consequence, would draw some share of the remanent price; whereas, by

the brigadier's scheme, he was entirely excluded. The Lords found the brigadier might exhaust the price of any part of the estate, by his sovereign rights affecting the whole, and that he might make the best use he could of his rights, provided the same were not acquired or made use of in *emulationem* of the colonel. Dalrymple, Bruce, 22d February 1715, brigadier Preston *contra* colonel Erskine.----A creditor, ranked in the second place, did, after the ranking, purchase in the preferable debt, and having these two rights in his person, he became purchaser of the estate at a publick sale, and gave bond for the price, payable to the creditors as they were ranked; the preferable debt purchased in by him, as said is, did not only reach over the lands purchased by him at the publick roup, but also over a separate subject belonging to another. The fact was, That the price of the lands, sold publickly, was but sufficient to answer the preferable right; and therefore, the purchaser, willing to bring his secondary claim within the price, craved payment of his preferable right, entirely out of the separate subject; which the Lords refused, and found, That the said debt, being in the person of the purchaser of the lands, upon which it was ranked *primo loco*, which purchaser granted bond for payment of the price to the creditors as ranked, the said debt became *eo ipso* extinguished *confusione*, and could not revive to be a charge upon the separate subject. 13th June 1729, competition betwixt Mr. Henry Ramsay and the bank of Scotland.

A CREDITOR by bond, wherein three persons were bound as co-principals, being the first arrester of a subject belonging to one of his debtors, was found not obliged to assign his bond to the other arresters for recovering from the other two co-principals the superplus paid to him out of the common debtor's effects, more than his third share, altho' relief of two thirds was competent to the common debtor himself against these co-principals. For this reason, That the creditors postpon'd might affect the said relief by diligences. Forbes, 24th February 1708, Kennedy *contra* Vans and Crawford.----- Robert Scot served heir in general, and confirmed executor *qua* nearest of kin to Sir William Scot of Harden, conveyed all subjects heretable and moveable that he had right to by these titles to Ker of Chatto. Some of Sir William's real creditors, infest in his land-estate, having also affected by diligence their debtor's other effects, conveyed, as said is, to Ker of Chatto, were in a competition preferred to the dispoinee. Ker thus excluded by the preferable creditors, demanded assignation to their debts and diligences in order to affect the real estate. It was answered for the creditors, That no person is entitled to demand assignation unless against his own debtor's effects. The Lords found, That in so far as Sir William Scot's creditors, are either paid out of his estate or out of his other effects, they are not bound to assign their debts and diligences in favours of Chatto. Forbes, MS. 29th June 1714, Scot *contra* Ker.---- In the year 1685, M'Guffock of Rusco, heretor of the lands of Borgue, granted an heretable bond for the sum of 2000 L. out of the saids lands, in favours of Irvine of Logan, whereupon the creditor was infest the same year. Thereafter, the said Rusco granted a disposition of the lands of Borgue in favours of his second son David Blair, reserving a faculty to alter, but which faculty he afterwards renounced in his son's contract of marriage; M'Guffock of Rusco being overcharged with debt, his estate, in the year 1727, was brought to a sale, and the said Irvine

vine of Logan, who had adjudged all his debtor's lands for the above-mentioned debt of 2000 *L.* was ranked as a preferable creditor ; and, upon his drawing payment, it was demanded by the other creditors, That he should assign them to his infestment upon the lands of Borgue. This was opposed by the relict and children of Borgue, upon this *medium*, That by Rusco's disposition to his second son, and after consent in that son's contract of marriage, he became bound to warrant the said lands ; the consequence whereof was, That had Irvine of Logan drawn his whole sum out of their lands, they must have been entitled to demand assignation against Rusco, bound to them in warrandice. Answered, Rusco was never bound to warrant against Logan's debt ; the disposition was under a reserved faculty to contract debt, alter, and dispose of the estate, &c. and supposing the son had paid the debt, he could never have distressed his father for the same ; and consequently an assignation would have been fruitless and ineffectual ; nor did the father's after consent in his son's contract of marriage, which implied a renunciation of his faculty, alter the case : For this could not be drawn to import an obligation upon the father to warrant or relieve his son of the foresaid debt. The Lords refused the assignation. January 1729, creditors of Rusco *contra* relict and children of Blair of Borgue.----- Mrs. Dalglish, creditor to the Earl of Roseberry, arrested the rents of his estate in the tenants hands, as also a personal bond of his, in the hands of Alves the debtor ; thereafter the same rents were arrested by Blair another creditor, who, by decret of furthcoming, was preferred *secundo loco* on that subject ; last of all, the common debtor granted assignation of Alves his bond for onerous causes to Robertson ; the debtor in the bond raised a multiple-pounding, wherein the arrester was preferred to the assigney. Robertson the assigney, whose subject was thus carried away by Mrs. Dalglish the arrester, demanded an assignation to the arrester's debt and diligence, in order to operate his relief out of the other subject affected thereby, *scilz.* the rents of the estate in the tenants hands. Against this demand, Blair, the second arrester of that subject, appeared for his interest ; it was pled for him, That he could not be prejudged by the common debtor's assigning to Robertson. It was answered, That the common debtor remained farr of the bond, just as much after Blair's arrestment as before, the arrestment not affecting the bond ; and therefore, his assignation to Robertson was valid and effectual in law, and did infer an obligation upon the catholic creditor, choosing to draw his payment out of a fund that now no longer belonged to his debtor, to assign for a total relief. Replied for Blair, That the bond being affected by the preferable arrestment, was made litigious ; and therefore, still to be considered as remaining in the person of the common debtor. The Lords found, That Mrs. Dalglish was not obliged to assign to the assigney Robertson, in prejudice of Blair's arrestment. 12th June 1730, competition betwixt Robertson and Blair. ----- George Gordon lent 1000 merks upon bond, conjunctly and severally, to Kincaid and Suittie, Kincaid got the money, and gave Suittie a bond of relief ; upon this bond, after the term of payment, diligence was done by horning and inhibition. Thereafter Kincaid, Suittie and Johnston, conjunctly and severally, granted bond of corroboration, containing a clause, obliging the other two to relieve Johnston as their cautioner. Johnston after this, and after ex-

istence of the inhibition, lent Kincaid, the common debtor, 100 L. Sterling by an heretable bond. Last of all, the said Johnston paid the debt wherein he was cautioner, and took from Gordon the creditor assignation to the debt and diligence, and insisted against Suittie for relief. In this process the question occurred, Whether Johnston was bound to assign the inhibition to Suittie upon payment? Johnston pled, That the inhibition striking against his heretable bond, the law did not oblige him to assign against himself. Suittie contended, That this rule holds not betwixt cautioners, who seeking relief of one another, are bound in strict law, from the nature of the contract, to assign. The Lords found no necessity upon Johnston to assign the inhibition. 12th November 1730, Johnston *contra* Suittie. --- A wife consenting to infestments of annualrent upon her jointure-lands, the annualrenters, after drawing their payment, must assign her to any other subject in which they are infest, in order to relieve her of what she suffered by yielding them the preference. Home, 17th February 1727, competition Sinclair of Southdun with my Lady Keith.

The creditor's passing from his separate security, is a liberation to the cautioner. A CAUTIONER in a contract of marriage, being pursued by the relict, her claim was found compensated and extinguished by the sums and goods she had confirmed in her husband's testament; and, that altho' divers of them were evicted from her by sentences at the instance of his creditors, in regard she was entitled to have pled a preference to the creditors upon her contract of marriage, and neglected to do it. Durie, 4th July 1628, Hamilton *contra* Bishop of Galloway's relict. --- A creditor having apprehended the principal debtor upon a caption, and kept him some days in the messenger's hands, and thereafter set him at liberty; this was not found sufficient to liberate the cautioner: It was yielded, That a creditor can pass from no consummate diligence or security to disappoint the cautioner's relief, but he may begin, without being obliged to finish any diligence: Thus, tho' he take out a horning, he is not bound to charge or denounce, or take out a caption, or put that caption in execution; and if there were not a discretionary power left to the creditor, it would be the occasion of most unmerciful distress; neither is there any thing more usual than for the creditor to stop when the messenger has touched the party, and to take a bond of presentation, or such other security as he can obtain. 21st January 1729, M'Millan *contra* Hamilton of Olivestob. --- The like. 16th July 1730, Grahams *contra* Little. --- There being a clause in a wadset-right, That in case the wadsetter should think fit to take possession, both principal and cautioner should be free of annualrent during the years of his possession; and the wadsetter, after being several years in possession, voluntarily quitting the same, without any intimation made to the cautioner, the cautioner was found liable for annualrent in time coming, from the date of the process, but not for bygones. Gosford, 24th June 1670, Robson *contra* Campbell of Kilpont. --- The creditor having consented to the relaxation of one of the cautioners, after he had denounced him, and thereafter, in common with some other creditors, having obtained a gift of his escheat, but being excluded in a process, in respect of his said consent, in a charge against another cautioner for the debt which was suspended, the Lords found the charger liable to make up the damage sustained by the suspender, by his the charger's consenting to

to relax the co-cautioner. Dalrymple, 25th January 1717, Wallace of Inglifton *contra* Lord Elibank.

THE creditor getting payment from a cautioner, was not only obliged to assign him for his relief against the principal, but likewise was decerned to convey to him a separate security, which he had obtained *ex post facto* for the same debt. Stair, 10th January 1665, Leslie *contra* Gray.

Must assign every separate security he has for the debt.

A CREDITOR of a tenant's having arrested corns belonging to his debtor in a third party's hand, a cautioner in the tack, who had been forced to pay the tack-duty to the setter's creditors, appeared in the furthcoming, and pled preference upon the right of hypothec. Answered, The right of hypothec was extinct by payment of the rent, the cautioner having demanded no assignation of the same from the setter. Reply'd, What a party is bound to do, the law holds as done: Here the tack-duty was drawn out of the cautioner's hands by the setter's creditors, so that there was no opportunity to demand assignation from the master; the law supplies this, and the cautioner pleads upon his legal assignation. The Lords preferred the arrester, in respect the cautioner had not an actual assignation from the setter to the tack-duty and hypothec. February 1735, Garden of Troop *contra* Dr. Gregory.

For the cautioner can reap no benefit from the separate security, unless conveyed to him.

A CAUTIONER, upon paying the debt, having obtain'd an ease from the creditor, the Lords inclin'd to think, That he ought to communicate the same to the principal debtor, yet they allowed him to be further heard thereupon. Fountainhall, 6th February 1702, Halyburton *contra* Halyburton.---A cautioner transacting the debt for a lesser sum, and obtaining assignation, was found only to have relief against his co-cautioner for half of the sum paid by him upon the transaction; for being engaged in a mutual relief, like partners in a society, they ought to do every thing toward the common interest. Stair, 27th July 1672, Brodie *contra* Keith.---The contrary had been found. Stair, 8th July 1664, Nisbet *contra* Leslie.---The seller being obliged to relieve the purchaser of the composition for his entry to the lands; it was found, That the purchaser could have no claim, if the composition was remitted to him by the superior, albeit he got it for other good services. Stair, 4th February 1662, Lord Elphinstoun *contra* Sir Mungo Murray.---A procurator-fiscal, by the judge's written warrant or mandat, having summarily poinded some goods without a preceeding charge or precept of poinding, and the fiscal being thereon pursued for the spuilzie, which he could not deny upon oath, and being decerned by the Lords for the value and violent profits, amounting to a vast sum, so that he was forced to transact and take an assignation, and then pursue the judge, by whose warrant he acted, to refund his damage; the Lords found, That the fiscal could not recur in warrandice for more than he paid himself, with the expences of this process. Fountainhall, 24th January 1712, Gordon *contra* Agnew.---A party *tanquam quilibet* buying debts, is not bound to communicate the cases to the debtor. Durie, 9th February 1639, Hamilton *contra* Lauder.

One entitled to relief, getting an ease upon payment, can claim nothing but the transacted sum.

RELIEF among *correi debendi*, whether in *solidum*, or only *pro rata*. See *Solidum & pro rata*.

RIGHTS affecting the subject acquired by the disponent, cannot be extended against the disponent bound in *warrantice*, further than to pay the transacted sum. See *Mutual Contract*.

SUPERIOR taking a gift of recognition, &c. how far he can extend this against his vassal. See *Jus superveniens*.

CREDITOR bound to maintain possession of the subject he derives from his debtor in security of his debt, and cannot invert possession to his prejudice. See *Mutual Contract*.

DECLARATOR.

Gift of ward,
if it requires
declarator.

A DONATAR to ward lands may enter to the possession of the ward lands, actually possess'd by the defunct, without declarator, but it was found ejection to dispossess the tenants before declarator. Haddington, 4th June 1595, *Fletcher contra* Earl of Murray.

Gift of non-
entry.

AN adjudication was found null, being founded upon a gift of non-entry without declarator, for non-entry must be declared, in order to make it become a liquid debt. Fountainhall, 19th July 1678, *Pourie Fotheringham contra* Marquis of Douglas. Sinclair, 16th July 1541, Lord Borthwick *contra* .---- But declarator of non-entry was found unnecessary, where the gift was in favours of the heritor himself. Haddington, .---- The superior of wardlands may remove tenants without declarator, but not in case of non-entry. Balfour, (*Removing*) 28th May 1540, *Ld. Dunoon contra* Stewart.

Gift of *ultimus hæres*
and of bastardy.

A GIFT of *ultimus hæres* must be declared the same way as a gift of bastardy. Stair, Gilmour, 30th July 1662, *Ld. Balnagown contra* Dingwall. Stair, Newbyth, Dirleton, 31st July 1666, *Crawford contra* town of Edinburgh. Hareus, (*Removing*) February 1684, Taylor *contra* Bruce and Strang.---- Yet a gift of bastardy was found not to require a declarator. Fountainhall, 26th February 1684, Taylor *contra* . But here the case was singular.

Gift of single and liferent escheat.

GIFT of liferent escheat not sustained without declarator, tho' proposed by way of exception. Stair, 18th December 1668, *Swinton contra* Brown.---- A debtor at the horn being relaxed, was found preferable, in a competition, to the donatar of single escheat, who had a general declarator depending, finding only caution to make the subject forthcoming to the donatar, in case he prevailed in his declarator. Haddington, 28th November 1610, *Whytbank contra* Home.

FOUND that a gift of recognition without declarator, altho' the donatar attain possession, cannot take away a feu-infestment, whereof the feuar was in possession. Auchinleck, (*Recognition*) 27th November, Black *contra* Pitman.----The active title in a reduction and improbation being only a charter and sasine upon a gift of recognition, which was never declared; the Lords refused to sustain process upon this title, tho' the pursuer was in peaceable possession, and the charter contained a *novodamus*. Fountainhall, 24th November 1699, master of Balmerino *contra* town of Edinburgh. Gift of recognition.

Tho' a gift of forfeiture pronounced in parliament needs no declarator, there can be no action upon such a gift without declarator, where the forfeiture is in virtue of a sentence before the court of Justiciary. Gift of forfeiture.
Harcus, (*Forfeiture*) March 1683, Lord Livingston *contra* Gordon of Torphichen.

A FATHER infesting his own child in an annualrent, redeemable by himself for a small sum, and in his own lifetime redeeming, the Lords found no necessity of a declarator of redemption in this case. Auchinleck, (*Redemption*) 29th July 1629, Philip *contra* Philip. Redemption.

A BOND being granted for security of the creditors payment in case of failzie, the debtor giving the creditor charter and sasine of some lands; in a pursuit of mails and duties thereupon against the tenants, the Lords found, That first the pursuer behoved to obtain declarator upon the failzie against the principal debtor, because the defenders could not know if the pursuer was paid, or if the failzie was incurred, &c. Durie, 21st January 1624, M'Math *contra* Lord Ochiltree. Failzie.

AFTER sentence of divorce pronounced *propter culpam mariti*, the wife may immediately enter to the possession of her liferent-lands, without any declarator. Colvil, 6th February 1579, Lady Restalrig *contra* the Laird. Divorce.

By a contract of wadset, the wadsetter being liable to accompt for the excrese of the duties more than should satisfy the annualrent; the Lords, in a process for mails and duties, found the exception relevant, that the pursuer was satisfied of the sum upon the wadset by his intromission, without declarator. Dirleton, 25th July 1673, Murray *contra* tutor of Stormount. Extinction by intromission.

IRRITANCY, if it requires declarator. See *Irritancy*.

DECLINATOR.

DEADLY feud betwixt a party and the inferior judge was found a good reason of advocacy. Balfour, (*Advocation*) 4th March 1545, Lord Methven *contra* Lord Gray.----An inferior judge's decret being reduced upon the head of iniquity, the party at whose instance *Inimicitia capitalis.*

the reduction was obtained, was found thenceforth exempted from the jurisdiction of that judge in all other causes. Balfour, (*Advocation*) 6th February 1561, Sheil *contra* Gudelade.

Partial counsel.

FOUND, that if any Lord of Session, or other judge, say to a party, or his procurator, That he might have better libelled, or answered better to the libel, he, as suspect, and partial in the cause, may be removed at the desire of the party. Balfour, (*Judge*) 15th February 1532, Master of Glencairn *contra* Prior of St. Andrews.-----Found, That if a party propone a declinator of the judge, as having given partial counsel, or the like, and the judge, at the party's desire, purges himself thereof, the cause cannot thereafter be advocate upon that ground. Balfour, (*Exception*) 2d May 1548, Weir *contra* Bannatyne.

Curator in his minor's cause.

A CURATOR *ad negotia* cannot be judge in the minor's cause, altho' the minor have also curators *ad litem*. Maitland, 17th March 1555, Lady of Lethington *contra* Ld. Corstorphin.

Magistrates in the burghs concerns.

THE Lords found the baillies of a burgh competent judges concerning debts due to the burgh. Forbes, 17th July 1706, Town of Dunbar *contra* Pringle.

Arbiter in questions upon the decreet-arbitral.

FOUND that some of the Lords of session being chose arbiters in a cause; may, nevertheless, sit and vote with the other Lords in the execution of the decreet arbitral. Colvil, August 1591, Coluthie *contra* Ld. Fingask.----Found that a Lord of session, who drew up a contract, might be declin'd, when any cause was intended upon the same. Haddington, 26th July 1605, Ld. Clerkington *contra* Ld. Hermiston.

Degree of relation necessary to found a declinator.

IN a question, Whether one of the Lords might be declined in a cause, where one of the parties had married his niece? The Lords found That he might be declined in any cause carried on immediately by his niece, but not in her husband's concerns, that were not derived from her. Fountainhall, 31st January 1712, Calder *contra* Ogilvie.-----Found, That by act 13th, Parl. 1681, the degrees of affinity reach only to father, son and brother, and not to nephew, brother's son, &c. seeing, properly, those in that degree are either consanguineans, or absolute strangers. A brother-in-law's son by my sister, is not *affinis*, but *consanguineus* to me; and a brother-in-law's son by another wife than my sister, is not *affinis* to me, but an absolute stranger, seeing *affinitatis nulla affinitas*. It was pled, That by the said act, the affinity of *socer*, *levir*, *gener*, father, brother, and son-in-law, was only meant; which arises from a conjunction with a consanguinean, and not of the affinity of *vitricus*, *privignus*, &c. step-father, step-son, &c. But this point was not determined. Marcus, (*Declinators*) March 1682, Mr. Hugh Maxwell *contra* my Lord Newton. Where it was also debated, If a judge might be as well declined upon his wife's account as upon his own.—The Lords repelled this declinator against my Lord Hercarfe, That Sir William Binning, the pursuer, was brother-in-law to my Lord, by marrying his Lady's sister, and was also uncle-in-law to my Lord's Lady, who was then deceased, but had left a child of the mar-

marriage behind her ; that relation being only *affinitas affinitatis*, which the act of parliament extends not to. And the like declinator in another case against the said Lord Herculfe, That Hugh Wallace and he, had married two sisters, was rejected, the Lady being dead. Marcus, (*Probation*) December 1687.

ALTHO' a procurator fiscal decerned executor, pursue *ratione officii*; yet, where he did not surrogate one in his place, the action was advocated, because the judge was his kinsman. Spotiswood, (*Advocation*) 8th July 1629, Boyle *contra* Gemmil. ---- And this tho' the procurator was to reap no advantage thereby, but only the nearest of kin. Durie, 8th January 1629, *inter eosdem*. ---- In a process against a burgh, concerning a contract made with them, a declinator having been given in against one of the Lords, as being uncle to him who was town-treasurer at making the contract, tho' now *functus*; the Lords rejected the declinator. Fountainhall, 27th July 1711, Paterfon *contra* town of Edinburgh.

In a process upon the passive titles, it was objected against the ground of debt, That it was a decret in absence, holding the defunct as confessed, obtained before the pursuer's uncle as judge; and that the act 13th, parl. 1681, provides not only, that judges in that degree of relation be declined, but that they shall not sit or vote in the cause of their near relation; and tho', upon a principle of equity, such decreets may stand to support legal diligence deduced upon them where the claim can otherwise be instructed, there is no equity to sustain them as an instruction of debt; the Lords sustained the objection, and found the debt must be otherwise instructed, than by holding the defunct as confessed. Dalrymple, 21st June 1699, Sir John Preston *contra* Rule.

DEFORCEMENT.

TENANTS that deforced their Lord's officer, were found to forfeit their tacks, and lose all their moveable goods within their master's jurisdiction; and this penalty was found to take place with respect to free tenants and feuars, both of spiritual and temporal Lords. Sinclair, 19th December 1541.

A LIBEL of deforcement was repelled, because a tenant against whom it was raised, alledged, That he had made payment of the debt upon which the letters were raised, which was admitted to his probation. Maitland, ult. February 1561, Abbot of Kilwinning *contra* tenants. ---- Found that an execution of poinding may be staid, without hazard of deforcement, either by a party pretending to have right to the goods, and offering to make faith thereupon; or by a master for his hypothec, if security is not given him for his rent; but that these alledgeances must be propon'd at the time of stopping the poinding, otherwise they will not defend against the deforcement, tho'

offered to be proved in that process. Durie, 1st February 1628, Halkerton *contra* Kadie and Grieves.---- Found that a messenger might lawfully be deforced in the execution of pointing of goods in a shop, when he had not his blazon at the time, tho' he was known in the place. Marcus, (*Deforcement*) March 1685, Robert Horse *contra* Fork.---- The Lords thought that a messenger was not bound to show his blazon in apprehending a man for debt, till he apprehended him, and touch'd him with the wand of peace, and therefore found the omission of that to be no excuse of a deforcement, because to show the blazon before, were to discover himself to be a messenger, and give opportunity to the rebel to run away; and some thought that he was not bound to give the caption out of his hand, since, in these hubbubs, they might tear it. Fountainhall, 18th January 1699, Lord Kinnaird *contra* Johnston and Douglas.

DELINQUENCY.

Parricide.

IN a declarator upon the act 220, parl. 1594, declaring, "That "murderers of their parents and their posterity *in linea recta*, "shall be disinherited, and the heritage shall pertain to the next collateral and nearest of blood," it was objected for the criminal's real creditors and his son, That the libel is not relevant, because, by the statute, it is expressly required, "That the criminal be convict by an "inquest," which is not, nor cannot be done, he being fugitate for not-compearance; the Lords found the statute to be *stricti juris*, and sustained the objection. Stair, Gosford, 3d February 1674, Oliphant *contra* Oliphant.

Perjury.

THE exception of perjury does not elide the debt, but only founds a criminal pursuit. Fountainhall, 12th November 1695, Yeman *contra* Rodger.

In what cases may a procurator-fiscal pursue without concurrence of the private party.

IN a suspension of a decret, obtain'd at the instance of a procurator-fiscal for a riot, notwithstanding of a disclamation by a private party; the Lords made no doubt but that a procurator-fiscal may pursue *ad vindictam publicam*, and were clear there is no paralel betwixt the case of a procurator-fiscal of a commissary-court, in the case of scandal, and of a procurator-fiscal suing for a breach of the peace; that *diffimulatio*, abstractly considered, is not a good answer to a procurator-fiscal pursuing *ob vindictam publicam*, seeing he may pursue both parties; but then, upon perusing the proof, they found, That this was but a drunken squabble, in which the publick is very little concerned; and that it was officious in the procurator-fiscal to intent a process in such a case, and therefore suspended the letters *simpliciter*. 25th July 1738, Gilmour *contra* Cleland.

Scandal.

A SERVANT of the custom-board being accused to his masters of drinking King James VIII. his health, for which he was turned out of his office by the commissioners, and he thereupon raising an action of scandal

scandal against the party who had informed the said commissioners, and the commissaries having granted him a diligence to cite them as witnesses; the Lords, in an advocacy, considered, That a scandal implied a publick venting and spreading of the same, and that the informing the commissioners of the customs of the misbehaviour of one of their servants, could not make a man liable in a scandal, and therefore remitted the cause back to the commissaries as the most proper and competent judges to such actions, but with this express direction and instruction, That private informations given, were not relevant to found a process of scandal; and also, that a libel of scandal ought to be special as to persons, time and place, which was not the case here. Forbes, 31st December 1708, Fountainhall, 1st January 1709, Watkins *contra* James.-----The authors of the Edinburgh Evening Courant, in publishing the news of a mob that happened at the West Kirk, about settling a minister in that parish, tho' they kept within bounds of truth, yet dress'd up the story in colours very disadvantageous to some of the magistrates of Edinburgh, who were upon the spot attending the settlement, insinuating several sharp reflections against them; amongst others, several queries were adjected, such as, "It is submitted to the judgment of mankind, if there was much more order, caution and discretion observed by those who took upon them to compose the tumult, than even by the mob itself. And it may be justly queried, Whether the ordering out the city-guard without the bounds of the city to act a part in this affair, and whether imprisoning Fleucker the beadle were legal? Whether the town-guard's firing, killing and wounding so many persons, without reading the proclamation, as the law directs, be not a great crime? And whether the captain of the guard's beating Mr. M'Vicar's children and servant was not a manifest riot, if not hamesuken?" This matter having been brought before the Lords in the shape of a reduction of an inferior decreet, in which the news-writer had been fined in L. 10 sterling; it was pled for him, That news-writers, by inveterate custom, are tolerated to publish historical accounts of transactions, foreign and domestick, whether reflecting honour or reproach upon the actors. Answered, Libels of scandal are prohibited, in whatever shape they come out; the above paragraph is not in the spirit of a cool news-writer, but bears evident marks of rancour and resentment; and supposing the magistrates to have been in the wrong, the parties injured, or those employed by them, ought not to inflict punishment at their own hands, while there are laws in being by which they may be redressed: For this reason it is, that *veritas convicii non excusat*. The Lords absolved from the reduction. 3d July 1733, M'Euen *contra* magistrates of Edinburgh.

GRANTING of double rights punished with confiscation of moveables. Balfour, (*Double Alienations*) 15th January 1505, the King *contra* Telfour. Stellionat;

THE Lords refused to sustain action of declarator of a liferent of a person who had killed herself, she having been furious six months before. Hope, (*Horning*) *contra* .---A man in Stirling having given a mortal wound to another, and upon the friends their pursuing him with drawn swords, taking the water of Forth, and Suicide;

having drown'd ; the Lords found, That his escheat did not fall, because the deed was not self-murder. Haddington, ult. January 1610, Shearer *contra* Stirling.

DEPOSITUM.

What understood a depositum.

IN a pursuit at the instance of a nobleman against his taylor, for delivery of his parliament-robcs deposited with him, the Lords found it not sufficient to libel, that the same were lodged in his house, and expressly committed to his custody and keeping, unless the pursuer had also said, That the key of the trunk where the robes lay, was delivered to the defender, and that he took upon him the custody thereof, and to be answerable therefor. Durie, 18th March 1626, Earl Cassils *contra* Simpson.

Goods deposited taken away by force.

A PARTY that was pursued for delivery of writs deposited with him, was not heard to alledge, That, for eschewing *periculum vis majoris*, he delivered them in sure keeping to another, because the pursuer had only action against the defender, who might again pursue any other to whom he delivered them. Haddington, 23d January 1593, Buchanan *contra* Buchanan.---In an action of exhibition of a bond granted to a father, and deposited by him for the benefit of his daughter, in a third party's hands, provided she accepted it in satisfaction, and gave up her mother's contract of marriage, the depositary having deponed that he received the bond on these terms, but that thereafter he was called before the magistrate of the place by another man, who alledged right to it, and was summarily incarcerated, and forced to deliver up the bond to that man on his receipt, before he could obtain his liberty. The Lords ordained, either to deliver up the bond to the pursuer, she renouncing as above, or else pay the sums therein contained, *nomine damni*, reserving his recourse against him who got it from him. Fountainhall, 7th November 1696, Braidy *contra* Gow.

Effect of an *actio depositi*.

SOME merchants having entrusted two barks loading of Spanish salt with a party at the Lewis, who gave two receipts for the same ; that, to one of the skippers, bearing, That he should either deliver the salt, or else the equal quantity and quality at Leith, when demanded ; and that to the other skipper, bearing precisely, That he should keep the salt therein-mentioned as he did his own, and dispose of it as they should order ; and they having, three years thereafter, required them to deliver back the salt, when the price thereof was exceedingly risen, they having disposed upon it, and offering to pay them the current rates that salt gave when they received it ; the Lords, in a process against them, found, That as to the salt contained in the first receipt, where the skipper had power of disposal, he was liable for the price of the salt at the time of its delivery, or at the time of his making use of it, or the produce of the herrings that were cured with that salt, and gave the pursuers their election of any of the three ; and for that first ticket, refused to find him liable in the price that the salt was giving the time of the requisition ;

fition ; but as to the second receipt, where there was a clear *depositum*, and no power given the skipper to intromet therewith, (tho' he pleaded it to be one of these things *quæ servando servari non possunt*, and that therefore he rather deserved thanks for disposing of it before it should perish) the Lords found, That he having intrometted with, and disposed on it at his own hand, without any warrant or allowance from the owners, he must be liable for that price which salt was giving at the time of the requisition. Fountainhall, 9th, Forbes, 19th January 1711, Watson *contra* M'Kenzie.

DESUETUDE.

THE act 14th, parl. 1621, anent playing at cards and dice, found not to be in desuetude. Stair, 12th November 1668, Park *contra* Somervell.---In a trial of a gift from the king to Moncrief of Redie, giving him the heritable presentation of one of the macers to the court of session ; it was objected, That the gift was null by the 44th act, parl. 1455, discharging offices to be given out in fee and heritage in any time coming. This was found to be a tender point ; for, on the one hand, to find the act in desuetude, was to encourage Kings and their ministers to give away and delapidate all offices ; on the other hand, to find that act in *viridi observantia*, would be to alarm the nation, and unhinge all the heritable offices, which had been peaceably enjoyed time out of mind. Some were for making a distinction betwixt those clad with possession, and this, which was only in *adipiscenda possessione*, yet this was still dangerous ; for the Dukes of Queensberry, Gordon, &c. had got heritable rights of regalities, which was neither confirmed in parliament, nor corroborated with 40 years possession ; and even the old ones might be quarrelled, and the prescription might be alledged to be interrupted by the King's revocations, minority, absence by banishment, and many other pretences : Therefore, to shun all these dangers, the Lords fell upon this expedient, That this nullity was not receivable by way of exception, but only in a reduction by the King's advocate, authorised by his Majesty's special warrant. Fountainhall, 2d February 1693, King's advocate *contra* Moncrief of Redie.---In a declarator of a right of constabulary, at the instance of Erskine of Dun against the town of Montrose, it was objected, That the said right of constabulary was null by the 44th act, parl. 1455, declaring, *That no office in time to come should be given in fee and heritage*. It was answered, The act was gone into desuetude ; which the Lords found. 25th June 1731, Lord Dun *contra* town of Montrose.

DIES INCÆPTUS.

IN a question about the return of a tocher, the wife having outlived the year, and only six hours of the next day ; the Lords preferred the husband to the tocher, and found, That in this case *dies cæptus habendus*

bendus est pro completo. Stair, Fountainhall, 25th February 1680, Waddel *contra* Salmon.

A CREDITOR being required in the terms of the act of parliament 1696, to alimēt a prisoner, and having forborn to do so, tho' the magistrates, according to the act, kept in the prisoner till the tenth day; and then, no offer of alimēt being made, did set him at liberty at 12 o'clock that day, alledging, That in such favourable cases, *dies cæptus habetur pro completo.* The Lords repelled the alledgeance, and found, That the days in the act of parliament, were *tempus continuum*, and to be computed *de momento in momentum*; so that magistrates, having anticipated some hours, must be liable. Fountainhall, 11th November 1704, Margaret Blair *contra* town of Edinburgh.

THE Lords reduced a bond of cautionry subscribed by a minor, altho' he wanted but twelve or eighteen hours of majority. Durie, 26th June 1624, Drummond *contra* Ld. Cunninghamhead.

DILIGENCE.

Diligence prestable by apprisers.

Not bound
to do diligence.

EVEN after the act 6th, Parl. 1621, an appriser is only liable to accompt for actual intromissions, and not for what he might have intrometted with; for he is not bound to intromet with any more than he pleases, or to do diligence. Durie, 16th January 1634, tutor of Balmaghie *contra* Maxwel. The like. Durie, 2d July 1625, Kincaid *contra* Halyburton.

If he enter
to the natural
possession.

IF an adjudger enter into the natural possession of any part of the lands, he becomes liable for the rent *qua* tenant; and so in a compt and reckoning with the debtor, he has no claim, tho' his stocking should perish, and he be a loser upon his possession. Durie, 23d December 1629, Dickson *contra* Young.

If to the pos-
session of mails
and duties.

AN appriser in possession, found accountable by a rental, as the lands paid at the time of his entry, but prejudice of just defalcations; for the Lords thought, That albeit apprisers are only accountable for their intromission, that is, for such parts of the lands only, as they enter to possess, and not for those they never possessed; yet in so far as they once entred to possess, they must do diligence. Gilmour, December 1661. Stair, 4th January 1662, Seaton *contra* Rose-wall

Excluding
other credi-
tors.

IN a competition among creditors, he that was preferred *primo loco*, was bound by the Lords *ad exactissimam diligentiam*, for recovery of his own payment, that so way might be made for the succeeding comprisers. Durie, 11th February 1636, Colquhoun *contra* Ld. Balvie. Stair, 28th July 1671, Murray *contra* Earl of Southesk. ----- An appriser excluding other creditors in a competition, and entring to possess, is accountable according to the rental, not only for intromission, but

but omission, both till the apprising be satisfied; and thereafter for all years of which he uplifts any part. Here it was argued, That an appriser, during the legal, is accomptable for the full rents, because he excludes others; which reason ceases after the apprising is satisfied. To which it was answered, That it is the appriser's part, who knows when he is satisfied, to relinquish the possession, which cannot be known by others, till the event of compt and reckoning; so that it is still truly because he excludes others, that he is liable even after he is satisfied. Stair, 26th January 1671, *Casse contra Cunningham*. ----- One appriser offering to prove another paid within the legal, in so far as he had taken a decret for mails and duties against the tenants of the whole lands, and had uplifted part; and therefore, ought to accompt conform, seeing, that by this decret, others having real rights, compearing and competing on these rights, were excluded from intromission. The Lords found the said appriser liable to compt according to that decret, seeing others were excluded, except he could instruct, That he did diligence against the tenants, and could not recover payment. Fountainhall, Stair, 14th January 1681, *Muir contra Schaw*.

In a compt and reckoning against an appriser at the instance of another, not within year and day, it was urged, That the defender having formerly excluded the pursuer in a competition, ought to have done most exact diligence for recovering the rents; and that a horning and denunciation, with a caption never put in execution, was not sufficient; the Lords found, The defender ought to have pointed, unless he can show, That the same would have endangered laying the land waste. *Harcus, (Comprising)* February 1683, *John Muir contra Schaw of Grimet*. What is sufficient diligence.

In a declarator of expiration of the legal of an apprising, where the creditor had been in possession; the Lords found, That his having been interrupted in the possession, *via facti vel juris*, by the debtor, was sufficient to liberate him from accompting by the rental; and, that he was liable only for his actual intromissions, until it should be made appear, that he was again peaceably possessed: But this was only sustained in prejudice of the debtor who interrupted, there being no other creditors compearing. Fountainhall, Stair, 20th January 1681, *Burnet contra Burnet*. Interruption of possession.

A TENANT who had a current tack, having, after a comprising, deserted his possession; found, That the lying waste thereof ought not to prejudice the debtor, but that the comprisinger ought to be comptable for the same, since he neither laboured nor set it, nor made any intimation to the debtor to take care of it. *Durie*, 9th February 1639, *Hamilton contra Lauder*. Tenant deserting his possession.

Diligence prestable by assignies in security.

AN assignation in security, taken by a creditor from his debtor to mails and duties, and intimated to the tenants, was found not to oblige the assignee to accompt for these rents, unless he had debarred the cedent Not bound to do diligence.

dent or his creditors from uplifting. Forbes, 27th June 1706, M'Micken *contra* Kennedy. ---- An assignation to some accompts in a tradesman's books, being granted by him to his creditor for security, who suffered the accompts to perish by doing no diligence, and returned after many years upon the cedent's heir for his money; yet the Lords found him not accountable for diligence, and that the debts perished to the cedent. Forbes, 27th, Fountainhall, 28th December 1709, Smith *contra* Vint. ---- It was found, That a person getting a disposition to lands in trust, in order to sell the same, and pay himself of what was resting him by the granter, and not intronetting with the rents of the lands for several years, was not liable for these rents, unless it were instructed that he entered to the possession. Bruce, 8th June 1715, Anderson *contra* Corbet.

Partial intronmission.

A DISPOSITION to moveables with symbolical possession, being granted in security of a debt, and the creditor intronetting with a part only, the rest remaining in possession of the debtor; he was found liable only for his actual intronmissions. Home, February 1682, Home *contra* Home. ---- An assignation to a tack in security of a debt, established by an infestment of annualrent, was found not to make the assigney entring to possess by virtue thereof, liable to intronmet beyond his annualrent, or accountable for more. Forbes, 22d July 1709, Duncan *contra* Graham.

Clauses inferring obligation to do diligence.

AN assignation being granted with absolute warrandice, *in case payment was not obtained*; the Lords found this relevant to assioilzie, *viz.* That the assigney had done no diligence to recover payment, because they thought, that such a clause implied a necessity to do diligence, unless the assigney would prove that the debtor was insolvent when the assignation was granted; and found it relevant to the defender, That the debtor had then a visible estate. Stair, 7th, Fountainhall, 8th February 1678, Executors of Stewart *contra* Melvil. See Gilmour, February 1664, Bruce *contra* Morison, where the contrary seems to have been implied.

Diligence prestable by annualrenters.

Preferable annualrenter must do diligence.

IN a competition upon two annualrents out of one barony, the Lords ordained the first annualrenter to do diligence within twenty days after each term; that after that time the second annualrenter might do diligence, or otherwise the lands to be divided conform to the annualrents, the first annualrenter to have his choice. Stair, 15th February 1662, Lady Moufwal elder *contra* Lady Moufwal younger. ---- In a similar case, the first annualrenter was allowed forty days after each term to do diligence, after which it should be lawful to the second annualrenter to do diligence without respect to the prior infestment. Stair, 26th July 1662, Ayton *contra* Wat. ---- It being alledged for a posterior real creditor, That the common debtor's relict, who was preferred, suffered the said common debtor's heir to uplift the rents; so that her annualrent running on, did exhaust the rents when he came to poind. The Lords declared, That in time coming, the Lady should be obliged to poind the tenants upon her decret, within forty days after the term

at

at which the rent is payable, after which time there should be access for that other creditor to poind the ground, without prejudice to the Lady to poind for the bygones of her annualrent. Home, February 1687, Lady Whittingham *contra* tenants and creditors thereof.

AN annualrenter is not liable for diligence further than for payment of his annualrents, tho' he exclude others. Stair, 26th January 1671, *Cassie contra* Cunningham. ——— A creditor by an heretable bond and infeftment, having obtained a decreet of mails and duties against the tenants, preferring him to other competing creditors; the Lords found him accomptable for the rents due by these tenants against whom he obtained the decreet; but for his actual intromissions, only after their removal. Forbes, 21st February 1712, Moncrief of that ilk *contra* creditors of Campbell. Excluding others.

Diligence prestable by donatars.

A DONATAR of liferent escheat, who had given backbond restricting the gift to his own payment, was found liable for no diligence, except in so far as he excluded others, or *dolose* deserted the possession; and the voluntary payment of the tenants, without sentence, made him not liable for subsequent terms. Stair, 17th January 1678, Crawford *contra* Charteris. The like. Fountainhall, 14th January 1680, *inter eosdem*. — A donatary of single escheat, being bound by backbond to make furthcoming what was over payment of his own debt to the other creditors, was found only accomptable for his actual intromission. Fountainhall, Marcus, (*Escheat*) 18th February 1686, Grange Dick *contra* Hamilton. Home, January 1687, Hamilton *contra* Dick. But upon this occasion an act of federunt past, making donatars liable to do diligence.

Diligence prestable by liferenters.

IN a pursuit at a widow Lady's instance against her deceased husband's representatives, for making up the deficiency of her conjunct fee; found, That she having possessed the conjunct-fee lands for divers years, without making any legal intimation to the defender of the deficiency, the same ought to assoilzie him from all bygones, he proving the conjunct-fee lands to have been worth what they were given up for at the marriage, and found it sufficient for him, in time coming, to offer sufficient tenants for taking the lands at the said rental, and for whom he should be cautioner. Newbyth, 22d June 1666, Lady Milntoun *contra* Lamington.

Diligence prestable by executors.

THE nearest of kin confirming some of the defunct's moveables, is not liable, tho' he knowingly omits others; for this debar no other party having interest, seeing they may confirm *ad omiffa*. Durie, 2d December 1628, Pool *contra* Morison. Durie, 18th June 1629, Peebles

Peebles *contra* Knight.---A brother having confirmed himself executor *qua* nearest of kin, neglecting a sister of equal degree, and having *ex proposito* omitted several articles out of the inventory, the Lords, *in pænam* of this fraudulent omission, decerned the subjects omitted, to belong solely to the sister, and found that the brother had forfeit his interest in the same. Fountainhall, 16th February 1703, Robertson *contra* Robertson.---An executor obtaining decret, but doing no diligence, was found liable, unless he would prove the debtor was insolvent the time of the decret. Gosford, 14th December 1675, Thomson and Halyburton *contra* Ogilvie and Watson.-----The Lords found an executrix liable for diligence and omissions, altho', by the testament, the legataries, and others therein honour'd, had power, in case of her refusing or delaying to implement the defunct's will, to pursue for, and affect the whole goods convey'd to her, as effectually as if the same had been directly disposed to themselves by the defunct. Forbes, 23d July 1708, Lord Elibank *contra* Lord Prestonhall.----A man having left a legacy of 1000 merks, out of the rests due by his tenants, the executor was found liable to have done diligence against the tenants, within the year when the hypotheck remained upon their goods. Stair, 21st January 1673, Forbes *contra* Forbes.----An executor was not allowed to exhaust the testament by an heritable debt paid by him without distress, seeing he had omitted to do diligence against the heir for his relief, but behoved to take this heritable debt in his own hand. Fountainhall, 26th December 1704, Robertson *contra* Baillie.----The Lords found executors-creditors bound to diligence for the whole inventory, just as any other executor, and that not only for the payment of their own debt, but that the superplus may be made furthcoming to the rest of the defunct's creditors, and others having interest. Gilmour, June, Dirleton, Newbyth, 27th July 1666, Craig *contra* executors of her husband. Fountainhall, 7th February 1679, Pearson *contra* Wright.----Executors-creditors having given up inventory far exceeding their own debt, and being confirmed, were found not liable to the superplus of the inventory not intromitted with, or to shew diligence against the debtors, but only *cedere actionem* to another creditor or nearest of kin; and this the Lords declared they would make a practick in all time coming. Gosford, 18th July 1671, Harlaw *contra* Home. See act of federunt 14th November 1679.

Diligence prestable by tutors and curators.

Must do diligence.

THE Lords found a tutor liable in omissions, and for the whole duties of the lands wherein the minor's father died intest, altho' he never intromitted therewith, and this notwithstanding the minor himself was not intest, since that was still the tutor's fault. Durie, 26th January 1628, Commissary of Dunkeld *contra* Abercromby.----A tutor not doing diligence for bonds left in the defunct's charter-chest, which were granted to the grand-father, and were never confirmed by the pupil's father, was found liable; only the pupils were first found obliged to do diligence, that it might be known whether the debtors were *solvendo*. Gosford, 17th February 1670, Balfour *contra* Wood.----Found tutors liable to diligence for all bonds and tickets, whether contained in the inventory of the defunct's testament or not, as also for all

all the accompts in the defunct's compt-book, tho' not contained in the inventory of his testament, being contracted within three years of his decease; and as to other accompts preceeding these three years, before answer, ordained the pursuer to condescend what of the debtors therein contained were alive within year and day after the tutors accepting the office, so as they might have done diligence, and referred the accompts to their oaths. Fountainhall, Duff *contra* incorporation of the taylors in Edinburgh.

THE dubiety of a pupil's right, found to be no ground nor defence whereon a tutor could seek to be exonerated from not having done diligence, for to recover the same. Fountainhall, 11th February 1702, Elphinston *contra* Miln.----A father having given up, in the inventory of debts due to him, a sum promised by his wife's brother, over and above the tocher; in a pursuit, at the instance of his daughter against her curator, for suffering this debt to perish, but no other writ appearing for it save the inventory, the Lords assilzied the curator. Fountainhall, 14th December 1710, Smith *contra* Smith. Bound to pursue dubious claims.

A TUTOR was found liable for annualrent of the pupil's money run on unuplifted during his office, and refused to allow him to discharge himself, as yet resting in the hands of responsal debtors; but the Lords ordained the minor to furnish him with the bonds for procuring payment of the outstanding annualrents. Forbes, 11th June 1709, Lady Riddoch *contra* Forsyth. Liable for annualrents unuplifted.

IF the pupil's debtors be unquestionably *solvendo*, the tutor can have no occasion to do diligence, but if a debtor or his cautioner be *vergens ad inopiam*, the tutor is bound to do all diligence for uplifting the sums, unless the debtor become entirely bankrupt suddenly, which the tutor could not foresee, in which case he is not liable. Stair, 9th July 1667, Steven *contra* Boyd.----In a nomination of tutors, the father, among others, pitched upon a debtor of his own, and this tutor having suddenly broke, after several years management of the pupil's affairs; in a pursuit against the co-tutor for payment of this debt, the Lords found that co-tutors are not liable for one another's debts, but only for administration of their office; and sustained the defence, That the tutor was held solvent till he broke of a sudden. Fountainhall, 7th July, Dalrymple, 26th November 1699, M'Murdoch *contra* Finlay. If a debtor becomes suddenly bankrupt.

A TUTOR was not found liable to pay a debt due to his pupil which had been lost by a bankrupt debtor during his management, tho' he had done no sort of diligence against the debtor, by horning, caption or comprising, during the space of three years, unless it were alledged, that the debtor was at that time in such circumstances, that money might have been recovered by virtue of such diligence. Durie, 2d July 1628, Hamilton *contra* Hamilton.----The like. Haddington, 6th February 1623, Watson *contra* Matthison.----The tutor's cautioners being sued for the tutor's omissions, in not doing diligence against some of the pupil's debtors; and an answer being made, That he was stop'd by the surcease of justice in November 1688, and died shortly thereafter; besides that many of the debtors were insolvent, so that it was casting away money to pursue them. The Lords thought it too strict to require diligence Cui incumbit probatio of bankruptcy.

diligence of the tutors in this circumstantiat case, and therefore allowed them to prove that these debtors were then habit and repute insolvent. Fountainhall, 16th January 1696, Irvine *contra* Spence.

Continuing
to intromet after
expiry of
his office.

A CURATOR continuing to intromet after expiring of the curatory, is only liable for his actual intromissions, not for any diligence or omission. Gosford, Stair, 18th November 1671, Cals *contra* Elies.

What is sufficient
diligence.

A TUTOR is bound to do diligence according to the circumstances of the debtor; if there is land, he must apprise; if goods, poind; if sums, arrest; and, *in subsidium*, to use personal execution. Stair, 9th July 1667, Steven *contra* Boyd.----A tutor's adjudging the debtor's estate for a debt due to his pupil, found a sufficient diligence to exoner him, tho' moveables were condescended upon which he might have affected; for, besides the loss of apprising moveables, it crumbles down and breaks a principal sum. Fountainhall, 15th February 1693, Cathcart of Carleton *contra* Brown of Colston.

Diligence prestable by factors and mandatars.

In what cases
liable to do
diligence.

A FACTOR is liable to do diligence, if the factory contain a salary, tho' not containing any clause obliging him to do diligence. Stair, 7th January 1680, M'Bride *contra* Lord Melvil.----A factor named by the minor's father, was found not liable for annualrent of money uplifted by him, unless it had born annualrent, or that he had got annualrent for it, and so was *lucratus*, in respect the factory did not oblige him to employ or to do diligence, nor contained a salary, which imports diligence, Marcus, (*Minority*) March 1683, Sutherland *contra* Ross.----A party being pursued by an heritor for divers years intromission with the rents of a barony, for which he had no written factory or commission, but only verbally as a friend; and the witnesses having deponed touching his partial intromission with some of the rooms, which was urged as a general intromission to make him accomptable for the whole; this the Lords repelled. Fountainhall, 8th February 1701, Irvine *contra* Irvine. The contrary. Home, March 1686, Duke of Queensberry *contra* Wilson.----Mandatars are liable in diligence, where the mandat requires diligence, as a factory, or the like; but a power to receive money, given to one as a friend, not a factor, does not import diligence, but only that he should present his commission, and receive the money. Stair, 17th July 1672, Earl of Weemyss *contra* Thomson.

Factor appointed by the
Lords.

IN a compt and reckoning at the instance of an heritor of a sequestered estate, against a factor appointed by the Lords, who, during his factory, got a disposition in trust from the pursuer, and, by virtue thereof, had transacted all his debts; the Lords found the defender liable to accompt at a rental, and not for his actual intromissions only, altho' the pursuer had a promiscuous intromission. Forbes, 18th July 1710, Gibson *contra* Cochran.

Chamberlain of the
crown.

THE Lords refused to exoner a chamberlain of the crown rents, for answering and being liable for the rests due by the vassals or tenants, by instructing diligence done for the same, the thesaurary and exchequer not.

not being in use to take rests off the hands of his majesty's chamberlains, sheriffs, stewards or baillies, who are bound to fit their *æques* yearly in exchequer, and get letters of relief against the debtors. Forbes, 27th July 1708, Duke of Douglas *contra* creditors of Spot.

FOUND, That a chamberlain or factor is not bound to poind tenants, if they have sufficient goods, and corn to sow and labour, because that by poinding, the ground would be laid waste. Gosford, 14th July 1676, Viscount of Oxenford and his curators *contra* Lady Chappel. ^{What understood sufficient diligence.}

Diligence of Trustees properly so called.

A TRUSTEE found not liable to do diligence, tho' he did possess, but only for his actual intromission, being, by a backbond, obliged to denude whenever the truster pleased. Stair, 18th December 1666, *Cass contra* Wat.----A person assign'd to a bond, with an obligation to do diligence against a debtor betwixt and a certain day, altho' the debtor die before the day, yet if he knew, and suffered another creditor to compromise, and himself do no diligence within year and day thereafter; the Lords found him liable for the whole debt assign'd, for which he should have done diligence. Gosford, 10th June 1674, *Weemyss contra* Wilson.----A merchant with whom bills of exchange, with blank indorsements were deposited in trust, having, by a writ under his hand, own'd his receiving of them, and that he was to negotiate them for the truster, upon getting his allowance of necessary expences and debursments; the Lords found him liable to exact diligence. Forbes, MS. 26th June 1714, *Stark contra* M'Kay.

A CAUTIONER accepting of an assignation, bearing to be for relief of his own and another's cautionry, was not found obliged to do diligence for the benefit of the other cautioner, unless he were required either to do diligence or to transfer. Stair, 18th July 1672, *Watson contra* Bruce.

Two cautioners having paid the debt, and an assignation being taken in the name of one of them, who granted a backbond to the other, obliging himself to do diligence against the principal debtor for their common relief; in a pursuit upon the backbond, it was not sustained to the defender, That, at the date of the backbond, the principal debtor was habite and repute insolvent; for it was found, That he ought at least to have taken out a caption, and attempted an incarceration. Fountainhall, 28th November 1711, *Ld. of Torquhain contra* *Ld. of Balmaghie*.

Diligence Nimious.

A MAN having suddenly perished at sea, and another, who was his creditor, getting himself, within fourteen days, confirmed executor-creditor, this was found nimious diligence, and the decret dative reduced at the instance of the defunct's son, with concurrence of the other creditors, he finding caution to compt; only the Lords declared, that they would have consideration as effeired of the defender's diligence, and what preference he should have thereby. Durie, 26th March 1631, *Winram contra* Williamson.

DISCHARGE.

Discharge
to one *correns*,
how far it o-
perates in fa-
vour of others.

A DISCHARGE granted to a tutor, was found not to operate a total liberation to the co-tutor, unless the discharge had born payment or satisfaction, but only in so far as it would cut him off from relief. Stair, Gosford, 19th December 1668, Seaton *contra* Seaton.---

The pursuer of a spuilzie discharging either the principal actor, or any of the accomplices, was found to liberate all the rest. Balfour, (*Spuilzie*) 14th March 1533, Muir of Arniston *contra* Somervell of Cambusnetham. 22d June 1554, Ld. Kinfauns *contra* John Barclay and others.--- The like. Colvil, June 1583, Ld. Garne *contra* Ld. Guthrie.---

A man, from whom goods were spuilzied, his transacting generally with any of the parties, and discharging him, was found sufficient to take away the action *in totum*, and relieve all the *correi*; but the pursuer having discharged only one of them for his own part, it was found, That such a discharge did not cut off the action against the other defenders. Haddington, 23d February 1609, M'Naught *contra* M'Ghie.--- He who transacted with one of the parties whom he pursued for spuilzie and ejection, receiving satisfaction, &c. was found to prejudge himself with respect to his action against the rest of the defenders; but having discharged him without any satisfaction, and only because he knew his innocence, this was found not to evacuate his action against the rest. Haddington 27th July 1610, Ld. Aberzeldie *contra* Lord Forbes.--- The Lords found this exception relevant in a spuilzie, That a discharge was given to one of the parties, altho' it was provided in the transaction, That it should not prejudge the pursuer of his action against the remanent defenders. Hope, (*Spuilzie*) 20th June 1611, Douglas *contra* Leith.----- A person of quality's factor being by him pursued for some years rents, and he alledging that he was employed only as a factor under the principal chamberlain, whom the pursuer had discharged, which must accresce to liberate him, but that discharge being without any previous compt, and alledged by the pursuer to have been only given as a personal complement when he returned first from his travels, and therefore could never exoner the sub-factors, who had never yet compted, either to the principal chamberlain or himself: The Lords ordained him to compt. Fountainhall, 31st July 1688, Duke of Queensberry *contra* Wilson.

Discharging
the debtor,
different from
discharging
the debt.

A DISCHARGE granted to a cautioner upon payment, was not found competent to be pled upon by the principal debtor, unless the cautioner did concur. Gosford, 8th, Stair, 13th July 1675, Scrimzeour *contra* Earl of Northesk. Here the discharge was not absolute of the debt itself, but simply of the cautioner's obligation, being *concepta in personam fidejussoris*.

Clauses im-
porting a dis-
charge.

A PARTY who had served several years for the shire as their commissioner to the parliament, having wrote to one of the heritors, thus, " I confess, Sir, I had never occasion to do you any act of kindness, " but, I hope, I have served the shire faithfully, and burdened them " with no expences, and I fully discharge you of any expences upon " the

“ the account of my representing the shire.” The Lords found, That this letter did import a full discharge and exoneration to the whole heritors of the shire, as well as to him to whom the letter was addressed, of all commission-fees, preceeding the date of the letter. Forbes, 18th June 1713, Burnet *contra* heritors of the shire of Kincardin.

DISCLAMATION.

A SUPERIOR pursuing for production of the vassal's evidents and holdings, needs not affirm him to be his vassal before production, but the vassal must either produce or disclaim. Colvil, February 1582.----Found that a party, who pretending to the superiority of lands, pursues another as his vassal for producing his holding, must first produce his own sasine of those lands, before the defender be compelled either to produce or disclaim. Haddington, Dalziel *contra* Dreghorn.----There can be no hazard of disclamation, where the superior is a singular successor, not formerly acknowledged by the vassal. Stair, 18th January 1681, Earl of Queensberry *contra* Irvine.

FOUND, That the vassal, whose liferent, or other casualty, had fallen in the superior's hands, could not disclaim him after the casualty had fallen, disclamation being introduced in favours of superiors. Auchinleck, (*Vassal*) Durie, Spotiswood, (*Disclamation*) 26th March 1628, Douglas *contra* Wedderburn.

DISCUSSION.

And first Discussion of Heirs.

THE heir of tailzie cannot be pursued till the heir-male of blood be discussed, the opposer condescending that there are lands, ^{Who have the benefit of discussion.} tiends or annualrents to which the heir-male may succeed. Hope, (*Heir*) 22d June 1621, Dunbar *contra* Hay.----The heir of line must be discussed before the heir of conquest. Auchinleck, (*Air*) 12th February 1630, creditors of Fairly *contra* his heirs.----The heir of line as creditor to the defunct, may insist directly against the heir of conquest, provided he himself renounce to be heir. Durie, 21st July 1630, Fairly *contra* Maxwell.----An apparent heir-male passing by his immediate predecessor who had been three years in possession of the estate without infestment; and serving heir to a remoter last infest; the Lords found, That he cannot be pursued upon the act of parliament 1695, to pay the immediate predecessor's debt, till after the heir of line be first discussed. Forbes, 13th November 1712, Vint *contra* Earl of Dalhousie.----A father taking a bond to himself, being in life, and to his second son, failing himself by decease; the father's creditors

tors contending, That the son, as heir of provision to that sum, was liable to them at least *in valorem*; the Lords assailed the defender, and found him not liable, the defunct having both heirs and executors: Fountainhall, 10th February 1700, Walls and her husband *contra* Maxwell.

No benefit
of discussion
betwixt heir
and executor.

FOUND, in consequence of an act of sederunt, That heretable bonds may not be pursued against an executor, nor a moveable bond against an heir. Hope, (*Executor*) Laird Meldrum *contra* Carnoucy.-----A man being bound to infest in an annualrent, and, at his decease, not being of that estate that he can have an heir, the party was found to have action against his executors, altho' the bond was heritable, and only proper against an heir, if any there were. Haddington, 14th December 1609, Gray *contra* Craig. Haddington, 16th January 1610, Spence *contra* Reid.---An obligation heritable being transferred, after the debtor's decease, against his executors, or the intrometters with his goods and gear, will only have execution against them for the annualrent resting owing before the defunct's decease, but not for the principal sum or annualrents for years after his decease, which is only competent against his heir or apparent heir intrometting with his goods and gear, unless the heir, being first discussed, be found not *solvendo*. Haddington, 24th May 1610, Hill *contra* Kinloch and Heriot.-----Found that not only an heir, but even an executor may be compelled to lay money upon land, in implement of a contract of marriage betwixt the defunct and his relict. Hope, (*Executor*) 17th, Haddington, 18th January 1611, Trail *contra* Jackson.-----A creditor may, at his option, pursue either the heir or executor, altho' the bond be heritable, because the heritable clause is understood to be insert in favours of the creditor, and therefore should not prejudice him. Hope, (*Executor*) 18th November 1626, Adams *contra* Gray. Spotiswood, (*Creditor*) Durie, 24th February 1627 Carnegie *contra* Lermouth.---An executor being pursued upon a minute of sale, was found liable to pay the price, tho' the bargain stood unimplemented *in nudis finibus contractus*, reserving action against the heir as accords. Stair, 1st July 1662, Baillie *contra* Henderfon and Jamieson.

Heir renouncing has no interest to plead this privilege.

THE heir of entail renouncing can have no interest to plead the benefit of discussion. Durie, 20th November 1638, provost of Stirling *contra* Livingston.

If an heir-male can in any case be pursued without calling the heir of line.

AN heir-male being pursued for payment of his predecessor's debt, the Lords found no process, in regard the heir of line was not called; and repelled the answer, That the heir of line had no visible estate, which supercedes the necessity of discussing the heir of line, but not of calling him. Stair, 24th January 1672, Ld. of Lufs *contra* Earl of Nithsdale.---But thereafter the Lords repelled the no process, unless the heir-male would condescend upon some estate belonging to the heir of line. Bruce, 25th January 1715, Allan *contra* Earl Lauderdale.

Nonecessity of discussion unless there be a visible estate.

IN a process against an heir-male, the Lords found no necessity to discuss the heir of line, unless he had a visible estate that could be affected.

fectd. Gilmour,
Lennox.

February 1662, Floyd *contra* Duke of

ONE having bound himself and his heirs-male, the heir-male was found liable *primo loco*, and the heirs of line *secundo loco*. Stair, 18th February 1663, Blair *contra* Anderson.---In a process against an heir of entail for payment of the predecessor's debt, the defender pled, That he could not be liable till the heirs of line were first discussed. Answered, No necessity of discussion, unless an estate could be condescended on to which the heirs of line may succeed; and here the heir of entail is expressly burdened with all the predecessor's debts, and consequently is bound to relieve the heirs of line. Replied, The heirs of line are impugning the tailzie, and it would be hard to make the defender pay the debt, while he is unsecure of the subject. The Lords found the heirs of line sufficiently discussed, by obtaining a decret against them upon a renunciation to be heir. Fountainhall, 11th January 1698, Colquhoun *contra* Stirling.

Where the heir-male is bound primarily,

AN heir-male, who is obliged to relieve the heirs of line, has not the benefit of discussion. Stair, 22d November 1665, Scot *contra* Boswal. ---In a like case it was not sustained as a good answer to the exception founded upon the benefit of discussion, That the heir-male, defender, had granted an obligation to the heir of line, to relieve her of the very debt pursued on. Dalrymple, 16th June 1715, Wightman *contra* Earl of Dalhousie,

Or bound to relieve the heir of line.

THO' an heir of conquest or tailzie must first be discussed, with respect to debts affecting the conquest or tailzied lands; yet, if the debt exceed the worth thereof, the heir general must first be discussed *pro reliquo*, before the others be bound to answer. Haddington, 18th June 1607, Earl Kinghorn *contra* Leslie. --- Burdens lying upon tailzied lands and bonds to infeft men in the property thereof, or annual-rents furth thereof, should be born by the heir of tailzie succeeding to these lands. Haddington, 19th February 1611, Fairlie *contra* heirs of Blair. --- The Lords found an execution proper against one who was heir of conquest, without discussing the heir of line, because the contract pursued on was made touching the lands that belonged to the heir of conquest. Hope, (Heir) 23d June 1615, Gordon *contra* M'Dowall.

Real burden follows the heir who succeeds to the lands burdened.

A DEFUNCT's creditor having discussed the heir general to the length of horning, he is not obliged to comprize the lands, but may next insist against the executors or heir of tailzie or provision. Haddington, November 1608, Home *contra* Ld. Restalrig. --- Putting the heir of line to the horn, is not a sufficient discussion; but his right ought to be discussed by comprizing or adjudication, or his person by caption, he not having renounced to be heir. Durie, Spotiswood, (Horning) 22d March 1627, Edgar *contra* Ld. Craigmillers heirs. --- A creditor having led an apprising against the heir of line, and offering to dispoise the same to the heir of provision; this was not found a sufficient discussion to give him access against the heirs of provision, since he did not put the same to execution. Stair, 29th January 1679, Lord Torphichen *contra* heirs of Oswald.

What understood sufficient discussion.

If the heir
must be fur-
ther discuss-
ed who has re-
nounced.

AN heir of line having renounced, the Lords found, That the heir of tailzie might be pursued, without first adjudging the *hæredetas jacens*, and that there was no need of further discussing; only they ordained the creditor to make assignation of his right to the heir of tailzie, that he might crave adjudication for his relief, of the right pertaining to the defunct, whereunto the heir of line might have succeeded. Auchinleck, (*Air*) 25th June 1629, Auchterlony *contra* Guthrie. The like. Stair, 22d June 1678, Crawford *contra* Heirs of Rattar. --- The contrary had been found. Durie, 26th January 1622, Cowan *contra* Murray. Dirleton, 18th December 1666, *contra*

----- The Lords found it not necessary to discuss a present heir of line before the heir-male, and of tailzie, where the former heir of line renounced, and an adjudication was led upon the renunciation, unless some estate belonging to the defunct was omitted out of the adjudication. Forbes, 23d July 1708, Staiton *contra* Earl of Lauderdale.

Discussion of principal debtors.

Cautioner
for an execu-
tor, has the
benefit of dis-
cussion.

THE tutor dative of an idiot, having confirmed him executor to a deceased brother, bound himself cautioner in the confirmed testament, and uplifted some money belonging to the said brother; and thereafter being removed by sentence of the Lords, and another nearest in blood put in his place, a sister, who stood in the same degree of relation to the defunct, pursuing him, as intrometter, for her half; the Lords found, that the idiot, principal executor, was liable, in the first place, to the pursuer, and that the defender could only be pursued *tutorio nomine*, or as cautioner for the executor; and found, That he cannot be liable *tutorio nomine*, now after he is exauctorated, unless he has the idiot's effects in his hands, nor as cautioner, till the idiot and his present tutor be discussed. Forbes, 14th, Fountainhall, 15th December 1711, Swinton and Bonar *contra* Maxwell.

Cautioner
for a factor,
collector, &c.

FOUND, That cautioners for common factors (which caution they find to the royal burrows) cannot be distressed, till the factor be first discussed, either before the conservator, if they be factors in the Netherlands, or before the Lords if here. Auchinleck, (*Factor*) 23d February 1630, Richie *contra* Paterfon. ----- In a pursuit against a cautioner for a collector of a town stent, the Lords sustained the defence, That the principal was not called, tho' he was known to be bankrupt, seeing cautioners for acts of administration, such as, for tutors and curators, &c. have *beneficium ordinis & discussionis*. Fountainhall, 13th November 1677, Sandilands *contra* Divvy.

Cautioners
who have not
the benefit of
discussion.

THE Lords found, That a cautioner in an indenture, taking burden upon him for the apprentice who was minor, had not the *beneficium ordinis*, in a pursuit for the penalty incurred, by the apprentice his deserting his master's service, and that he might be insisted against without discussing the principal. Forbes, 11th February 1708, Balfour *contra* Hutton. ----- A cautioner being bound as sovery and full debtor, tho' not conjunctly and severally, was found not to have the benefit of discussion. Gilmour, July 1665, Dunbar *contra* Earl of

of Dundee. Forbes, 18th June 1713, Montgomery *contra* Brown. A third party having granted an obligation to the creditor, to cause the debtor pay, or else to pay the debt himself; tho' he was only found to be a cautioner, yet he was refused the benefit of discussion, only he was allowed a diligence to call the debtor into the process, in case he had any defences against the debt. Fountainhall, 20th January 1693, Doull *contra* Home.

THE Lords found a cautioner in a suspension, only *subsidiarie* liable, altho' the principal was already so far discussed, that a decret of suspension was extracted against him. Fountainhall, 27th February 1702, Houston *contra* Schaw. ----- But the contrary was thereafter found, *viz.* That a cautioner in a suspension, after the letters are found orderly proceeded, may be charged summarily upon the bond of cautionry, without first discussing the principal debtor. Dalrymple, Forbes, 17th June 1714, Forbes *contra* Strachan. Cautioner in a suspension.

A CREDITOR can have no action against a cautioner in a confirmed testament till he discuss the executors, and it is not sufficient discussion to put them to the horn; he must also poind, and, failing moveables, go on to apprise. Durie, Haddington, 12th February 1623, Arnot *contra* executors of Home. The like. Hope (*Executor*) 10th December 1623, Stewart *contra* Fisher.---A decret against a principal, is no sufficient discussion so as to come at the cautioner, but there must be at least a registred horning. Stair, 24th July 1662, Brisbane *contra* Monteith.---He who has a decret against an executor, discusses him sufficiently by horning, and needs no further diligence before he have recourse to the cautioner. Haddington, 27th June 1610, Scrogie *contra* the constable of Dundee.-----The cautioner for a messenger being liable only *subsidiarie*, after the messenger is discussed; it was alledged, That the personal discussion, by a registred horning, is not enough. The Lords found, That the defender, cautioner, condescending on goods or lands belonging to the messenger, and giving his oath of calumny on the condescendence, the pursuer ought to discuss the same by poinding or apprising. Marcus, (*Cautioners*) 15th January 1685, Miln *contra* Graham. What understood sufficient discussion.

DISCUSSION of heirs portioners. See Solidum & pro rata.

IF a debtor who has the benefit of discussion, may be pursued in the same process with the principal. See Legal Diligence.

DONATIO MORTIS CAUSA.

A MISSIVE letter, written by a defunct to his spouse, bearing, That if he happen to die before his return, she should do with what he had as she pleased, was found to be only a *donatio mortis causa*, or legacy, which could only affect dead's part. Stair, 25th July 1662, Nasmyth *contra* Jeffray.---In a competition among creditors on an estate, the Lords preferred a liferent granted by a man to his spouse, tho' Deed in contemplation of death, the grantor being to travel.

it was objected, That it seemed to be only *donatio mortis causa*, because it mentioned in the narrative that he was going abroad, and might die before he returned home, and so was *contemplatione mortis*, and null, because he returned : But this the Lords repelled. Fountainhall, 16th February 1686, creditors of Connachie competing. ---- A gentleman going abroad, tailzied his estate to a cousin, and failing him to his brother, narrating, That he desired to avoid differences, in case of his not return, reserving power to alter, and dispensing with not delivery, &c. Before his return, the first substitute having deceased, and he himself returning, and deceasing thereafter, the second member of the tailzie entred heir upon the said disposition ; another cousin raising a reduction of the disposition, as a *donatio mortis causa*, it was found, That the tailzie was still obligatory, and, that it did not become void by the return of the granter, &c. Fountainhall, 17th February 1699, Leslie and her husband *contra* Leslie.

Bond payable after death, in case the granter die without heirs of his body.

BOND being granted by a man to his brother, containing disposition to certain goods, with provision, that they should not be delivered till after his decease, and the decease of his daughter ; she dying unmarried, after the decease of both, the assigney insisting for delivery of the goods, this was found not to be a *donatio mortis causa* ; and therefore, not revoked by the disponent's living seven years thereafter. Durie, 8th March 1626, Traquair and Robertson *contra* Bluschiels. ----- A bond granted to a niece, payable after the granter's death, *in case he left no heirs of his own body*, delivered in *liege poustie*, was found not revocable, not being *donatio mortis causa*. Stair, 8th December 1675, Thomsons *contra* creditors of Alice Thin. ----- One having disposed the whole sums and goods he should have at his death to his brother, if he survive him, and the disponent have no children of his own ; this was not found revocable as a *donatio mortis causa*. Stair, 10th January 1679, Grant *contra* Grant.

Provisio hominis, in place of a legal provision.

A CONTRACT betwixt a father and his daughter, wherein he was provided to 300 merks, to be paid out of the readiest goods and gear pertaining to his daughter at her decease, and which he accepted in full satisfaction of all that might fall to him by her decease, was found a *donatio mortis causa*, and alterable by the daughter at pleasure, in respect the father had no antecedent claim against his daughter ; and therefore the contract was interpreted to be of the nature of a destination of succession. Durie, 18th March 1636, Bells *contra* Park.

Condition of voidance express, no place for voidance as *donatio mortis causa*.

AN assignation being simply granted, and without any clog, but the assigney granting backbond to compt and pay to the cedent at his homecoming from abroad ; this was found to be no *donatio mortis causa*, nor revocable, by a posterior assignation granted abroad, the cedent never having returned home. Durie, 15th February 1637, Lauder *contra* goodwife of Whitekirk. ----- A man who had considerable means with his wife, having, at her desire, granted bond to her sister, for a sum payable at the wife's death, but with a faculty to the wife to alter or revoke, in case of ingratitude, &c. and she having accordingly revoked it by a writ under her hand, and given it to others, but without expressing any particular act of ingratitude moving her to alter ; the Lords found, That the granter must condescend on, and

and prove some act of ingratitude or provocation, otherwise they would not sustain her revocation. Fountainhall, 22d January 1709, Muir *contra* Bertram.

A BOND being granted by a man to a lawier, bearing, That it was for pains taken by him in his affairs, and because he had debursed some charges in doing thereof, and therefore binding him to pay the said lawier a sum, at the term after the granter's own decease, if before his said decease he did no other deed derogatory to the said bond, and also if he died having no heirs-male of his own body; this bond was found not to be *donatio mortis causa*, being granted for onerous causes, and so not revocable nor alterable. Durie, 2d March 1624, Lord Curriehill *contra* executors of Currie.

Bond granted for an onerous cause.

DOVECOAT.

A DECREE being obtained for demolishing a dovecoat upon a new foundation, because the builder had not ten chalders of victual, conform to the act of parliament; the Lords found, That the party was not obliged to demolish the dovecoat, seeing the house might be employed to some other use, but decerned the defender to build up the head of the dovecoat, so as doves could not enter, and to continue it so, till he acquired an estate conform to the act of parliament. Here the dove-house did not consist of a few holes, which are usual upon the top of another house, but contained five or six hundred holes. Marcus, (*Decrees*) November 1682, Durie of Grange *contra* heritors of Burntisland. --- By act 19th, parl. 1617, it is ordained, "That none thereafter shall have the privilege to build a dovecoat, unless he has ten chalders of victual:" But if one purchase land with a dovecoat from an heritor who had the privilege of a dovecoat, he may enjoy the same privilege, tho' he be not possessed of ten chalders of victual. And it was found, That if there was a dovecoat the time of the purchase, the purchaser may repair or rebuild it upon the same foundation, but with no more dovecoat-holes than the former had; but if it was ruinous the time of the purchase, he cannot rebuild it. 19th January 1731, Kinloch of Conland *contra* Wilson of Coul.

EJECTION.

THE entry *in vacuam possessionem*, without violence, and finding no interruption, may be sustained to infer the defender's intrusion to repossess the pursuer, but not to infer ejection, to make the enterer liable to violent profits. Colvil, January 1588, Mon-

Entry *in vacuam possessionem*.

cur *contra* Campbell. Haddington, 18th January 1623, Ld. Drumkilbo *contra* Laing.

What act of
violence will
infer ejection.

EJECTION was sustained, altho' there was no violence done to the pursuer's person or family, but only the house blocked up, and sustenance for man or beast stopped from coming in to him, so that he at length left the house. Colvil, 3d June 1575, Ld. Colliestoun *contra* Earl of Errol.

Who have
interest to
pursue.

FOUND, That no person had interest to pursue an ejection, but the actual and natural possessors of the land; and that a party could not pursue the same for the deed done to his tenants, but that it was competent to the master for ejecting his servants, hynds and cottars, because the master, by them, had natural possession, but not by the possession of his tenants. Durie, 26th November 1628, Bruce *contra* Bruce.---- A tenant being ejected, the Lords sustained ejection at the master's instance, tho' the tenant did not concur, but they refused to sustain it, *quoad omnes effectus, viz.* as to violent profits, *juramentum in litem*, but only that the master should be in the same condition he was in before the ejection, and should have the same manner of possession as if the land were not void, and to uplift the duties, and to put in and remove tenants, and for the bygone ordinary duties. Dirleton, 18th July 1666, Steel *contra* Hay.

Against
whom the ac-
tion lies.

A PARTY, tho' not present at the deed of ejection and spoliation, and a long time thereafter absent, was nevertheless found guilty of the saids deeds by ratification thereof, which ratification was also inferred by the persons coming to the house whence the pursuer was ejected, and continuing to reside there with her sons who had committed the ejection. Colvil May 1581, Anderfon *contra* Kinnier.

What title
necessary.

IN an action of ejection, the Lords found, That the pursuer ought to libel possession with some title, otherwise they found the libel not relevant. Balfour, (*Libel*) 2d, Colvil, 22d March 1573, Wishart *contra* Ld. Arbuthnot.---- Process of ejection was sustained at the instance of a tacksmen's relict, who had no title in her own person to produce, the tack having been only during life; and this because she had continued in possession three months after her husband's decease, and before the ejection. Spotiswood, (*Ejection*) Colvil, May 1583, Frazer *contra*

ESCHEAT.

May fall u-
pon a null hor-
ning

IN a special declarator of escheat, the horning was alledged to be null, as being upon a null decret, and falling therewith in consequence; this was repelled, because the party was in contempt, in not suspending *debito tempore*. Stair, 10th February 1663, Montgomery *contra* Montgomery.

THE donatar subjected to the debt in the horning, upon which the gift was taken, altho' he neither intromet, nor intent declarator, unless he renounce his gift *rebus integris*. Haddington, 9th February 1603, Stalker *contra* Murray. Haddington, February 1598, Master of Elphinston *contra* Erskine.---- But if he once begin to intromet, he is not allowed thereafter to renounce. Haddington, 1st January 1593, Finlayson *contra* Jackson. Durie, 15th March 1631, Fletcher *contra* Kid.---- Nor after will he be allowed to defend himself against payment, by pleading the nullity of the horning, and that therefore he lies open to be called to accompt by the rebel for his intromissions. *Ibid.*---- But the donatar was not found liable for annualrent that became due upon denunciation, seeing the same is not specified in the act of parliament. *Ibid.*

Donatar liable for the debt in the horning.

BONDS bearing annualrent are moveable before the term of payment of annualrent, and fall under single escheat. Stair, 26th, Gosford, 27th June 1668, Dick *contra* Ker.---- A sum due by bond, bearing an obligation to interest, and requisition, found moveable after requisition, and to fall under single escheat, tho' it continued to bear annualrent, because requisition made a sum moveable before the act of parliament 1661. Dirleton, Gosford, 12th January 1677, Jeffray *contra* Ld. Wamphray.---- An heritable bond on which interestment has not followed, falls under single escheat. Durie, 22d March 1634, Ochiltree *contra* Miller.---- The contrary. Durie, 1st July 1626, Halyburton *contra* Stewart.

What falls under single, and what under liferent escheat.
1mo, Bonds,

THE sub-vassal's liferent-escheat falling to the vassal, is carried as a part of the vassal's single escheat, when the vassal afterwards becomes rebel; but the vassal's liferent-escheat falling, the donatar thereof is intitled to the liferent-escheat of the sub-vassal falling thereafter; so that the sub-vassal's liferent-escheat first falling, makes a part of the casualty of the vassal's single escheat, but falling after the vassal's liferent-escheat, makes a part of the casualty of liferent-escheat. Durie, 26th February 1623, Sibbald *contra* Ld. of Lethinty. Durie, Spotiswood, (*Escheat*) Auchinleck, (*Vassal*) 8th March 1628, Douglas *contra* Ld. Wedderburn. Durie, 24th, Spotiswood, (*Escheat*) 26th July 1632, Rule *contra* Renton,---- A tack to one, and, after his decease, to his heir, for each of their lifetimes, and after that for 19 years, having fallen to the king by the forfeiture of the first tacksmen, and being gifted, the said tack was found in the person of the donatar, to fall under his single escheat, tho', in the person of the tacksmen, it would have fallen under his liferent-escheat, by 15th act, parl. 1617; and it was found, That the heir to the donatar of the forfeiture had no right thereto, but lost it totally by his predecessor's rebellion. Durie, 10th March 1631, Stewart *contra* Ld. Samuelston.

2do, Rights having transsumptoris,

A ROOM having continued several years in the natural possession of the proprietor, after his liferent-escheat had fallen; the Lords found, That the superior had only right to as many of the farms of the several years past, since the rebel was year and day at the horn, as the land was worth, and in use before to pay of rent; and that the king's donatar to the single escheat had right to the rest of the crop and increase each year, deducing the expences of labouring, &c. Durie, 23d March 1636, Murray *contra* the donatar of the commissary of Dunkeld his escheat.

3to, Where the rebel is in the natural possession.

4^{to}, What falls not under escheat single or liferent.

FOUND, That a bond of relief, not being liquid, falls not under escheat, unless there had been a distress prior to the denunciation, by which the relief would have effect. Fountainhall, 27th January 1685, *contra*.

Effect of liferent-escheat.

ACTIONS for annulling of feus, for not payment of the feu-duty, are not competent to be pursued by the donatar to the superior's liferent, whose right, being temporary, cannot produce such actions against the vassal to take away his property; neither was it respected, that the donatar restricted the sentence to have effect only during the vassal's life, seeing the feu could not fall for that space, and thereafter revive again. Durie, 4th February 1634, Ld. Wedderburn *contra* Stewart of Coldingham and others.

To whom single escheat falls.

1^{mo}, To the burgh.

A MAN committing slaughter within burgh, and being convicted, it was found, That his escheat belonged to the burgh, but if the party was fugitive, and denounced for non-compearance, that the escheat belongs to the king; because, in this case, the escheat falls not for a crime committed within burgh, but for non-compearance. Balfour, (*Burrows*) 28th May 1542, Ormiston the king's donatar *contra* town of Edinburgh.

2^{do}, To the Lord of regality.

THE single escheat of a minister falls to the king, and not to the Lord of regality, tho' the manse be locally within the regality; for manses being given by the king and parliament, are not reputed to be of any private holding, and acknowledge no superior but the king. Durie, 28th March 1628, Fletcher *contra* Irvine.--- The escheat of a rebel living within a regality, falls to the Lord of regality, and reaches his moveables wherever situated. Stair, 26th June 1680, Young *contra* Ld. of Raploch.

3^{io}, *Jus mariti*.

THE husband's *jus mariti* of lands belonging to his wife, which falls under single escheat, belongs not to the wife's superior by his rebellion, but to the king. Durie, 24th February 1629, Pollock *contra* Muir.--- The contrary had been found. Haddington, 23d February 1609, Ld. Bearford *contra* Drummond.

Liferent-escheat to whom it falls. 1^{mo}, Where infestment is not taken.

THE liferent-escheat of a subject, whereupon infestment had not past, was found to fall to the king, because liferent-escheat falls always to the king, where there is no superior, and there cannot be a superior without infestment. Stair, 22d July 1675, Menzies *contra* Kennedy.--- The like. Durie, 9th March 1624, Douglass *contra* Ld. Eastnisbet.--- For this reason a liferent-tack, which falls under liferent, and not single escheat, goes to the king by escheat, not to the setter. Haddington, February 1598, Leslie *contra* Stewart.

2^{do}, Liferent-office.

THE office of a sheriff-clerk falls in the king's hands by his rebellion. Hope, (*Horning*) 27th July 1615, Kinross *contra* Drummond.

3^{io}, Liferent-escheat of an apparent heir.

THE liferent-escheat of an apparent heir, the predecessor having died infest in the lands, falls to the superior of the lands. Haddington, 20th December 1622, Hamilton *contra* Bruce. Durie, 21st March 1623, Cunningham *contra* Earl Glencairn. Durie, 3d July 1624, Muir *contra* Auchannay.

4^{to}. Terce.

The liferent-escheat of a Lady tercer, belongs to the superior by her rebellion, altho' she had the terce only by consent of parties, and was never

never served, nor kenne'd to any terce. Hope, (*Horning*) 12th July 1622, Maxwell and Gordon *contra* Lochinvar.

THE gift of escheat is equivalent to an assignation, whereof general declarator is the intimation; and therefore, in competition with arrestments, the donatar or arrester is preferred, according as the general declarator or arrestment is prior in time, provided always, the arrestment be upon a debt prior to the rebellion. Haddington, 7th February 1611, tenants of Kirkness *contra* Foster. Durie, 22d February 1628, Anderson *contra* Gordon. Durie, 19th June 1630 Nisbet *contra* Lady Abercorn. Durie, 24th February 1637, Pilmuir *contra* Ld. Gagie. Stair, 19th February 1667, Glen *contra* Home. Stair, Gosford, 25th November 1671, Chalmers *contra* Deans. Forbes, 27th March 1707, Henderson *contra* Alifon. --- One having arrested a sum due to the rebel, and the donatary to the escheat being paid his debt, but he that was second in the backbond craving to be preferred to the arrester, as being in *eodem corpore*, the Lords found, That he ought to be preferred. Fountainhall, 17th November 1686, *contra*.

--- A donatary of escheat, declared in general, was, by the Lords, preferred to one arresting after the gift, before declarator, for a debt due before the rebellion; upon this speciality, That the donatary's gift proceeded upon his own horning, and he obtained declarator before the arrester recovered a decret of furthcoming. Forbes, 24th January 1712, Erskine *contra* Eliot. The like. Durie, Haddington, *penult.* February 1623, Halyburton *contra* Ld. Murtill's creditors.

GENERAL declarator, is the intimation of the donatar's right; therefore, in competition betwixt a gift of single escheat, and an assignation granted before rebellion, the right first intimated will be preferred. Maitland, 13th July 1566, Stewart *contra* Burn. Hope, (*Assignation*) 11th February 1614, Clark *contra* Napier. Durie, 12th February 1642. Mosman *contra* tenants of Monkcastle. Stair, 9th July 1662, Bones *contra* Johnston.

A CREDITOR confirming himself executor dative to his debtor, and then obtaining both sentence and payment from the defunct's debtors; in a special declarator, pursued by the donatar to the said defunct's escheat, the gift being posterior to the other party's sentence and recovery of payment; the Lords ordained the goods to be divided *pro rata*, (the donatar being also a creditor) in respect the executor-creditor had gotten payment; so that they thought it hard to make him restore all. Auchinleck (*Escheat*) 18th March 1628, Ld. Leyes younger *contra* Lindsay. ----- The Lords preferred an executor-creditor before a donatary of the defunct's escheat, the confirmation being before the gift, and a decret against the defunct's debtors obtained before the decret of declarator of the gift. Home, December 1684, M'Raith *contra* Kennedy. The like. Falconer, 6th November 1685, Polwarth *contra* Reoch. ----- A donatary of a defunct's escheat having first procured his gift, (being a creditor) and several months thereafter another creditor confirming, before intending declarator on the escheat; the Lords preferred the executor-creditor before the donatary. Forbes, 8th, Fountainhall, 10th November 1710, Arburthnot *contra* Borthwick.

With an apprising.

THE rule, *That creditors doing diligence before declarator, are preferable to the donatary of single escheat*, holds, by our practice, in moveables only, or moveable fums pointed or made furthcoming upon arrestments; but not in rights having *tractum futuri temporis*, which cannot be taken away from the donatar by any diligence posterior to the denunciation. Upon this footing, a donatar of single escheat was preferred to an appriser of a husband's *jus mariti*, the apprising being after the rebellion, tho' prior both to the gift and declarator. Stair, Gosford, 18th July 1668, Lord Dumfries *contra* Smart. The like, Hope, (*Horning and Escheat*) 6th July 1622, Murray *contra* Adamson.

Competition
liferent-es-
cheat with cre-
ditors.
1mo. Lapse
of year and
day establishes
the right.

SINGLE escheat, is a casualty that imports a conveyance of the rebel's goods, which, like any other acquisition, must be completed by laying hold of the subject; and therefore, a general declarator is necessary, which answers to the intimation of an assignation. The same, by analogy, may be thought to hold, where the liferent-escheat falls to the king, of subjects upon which infeftment has not past; but the liferent-escheat, which is a casualty of superiority, *nihil novi juris tribuit*; the superior enjoys the rents of his vassal's lands, not as deriving any right, or succeeding to him, but in virtue of his own radical right and infeftment, as in the case of ward; the vassal by his annual rebellion, being barred for life from insisting upon his property, or claiming the mails and duties. Hence, after elapse of year and day, the real right must be understood as fully established in the superior's person equally as if he were infeft upon a right derived from his vassal: But during the currency of the year and day, as the vassal has not yet incurred the penalty, nor the casualty taken place, having that time indulged him to satisfy the charge, every right granted by him before rebellion, completed within the year, will be preferred to the donatar of liferent-escheat. Durie, 5th, Hope, (*Horning*) 6th July 1622, Murray *contra* Adamson. Durie, 24th July 1632, Rule *contra* Billie. Durie, 3d December 1623, Harris *contra* Glendining. Durie, Spotiswood, (*Liferent Escheat*) 16th February 1631, Lord Cranston *contra* Scot. Durie, 3d December 1634, Lindsay *contra* Scot. Stair, 23d February 1671, Lord Justice Clerk *contra* Fairholm. Stair, 19th January 1672, Beaton *contra* Scot. Gosford, 15th July 1673, Savage *contra* Crawford. Fountainhall, Forbes, 28th November 1710, creditors of Spot *contra* Lord Alexander Hay.----Yet several other decisions have gone upon the footing, as if declarator were necessary to complete the gift of liferent-escheat, the same way as in a gift of single escheat. Thus a comprising, led after the lapse of year and day, with infeftment upon it, was preferred to a posterior gift. Hope, (*Horning*) 9th March 1615, M'Math *contra* Ld. Dinduff. The like. Durie, 8th February 1642, Weddel *contra* Earl Finlater.----And a creditor of a vassal, having arrested after year and day, and obtained decret of furthcoming, before gift or declarator of the liferent-escheat, was preferred to the superior's donatar, because of his diligence. Durie, 19th June 1630, Nisbet *contra* Lady Abercorn.

2do, With a
base infeft-
ment.

THE Lords found, That the donatary to a rebel's liferent-escheat was preferable to a base infeftment granted prior to the denunciation, unless either confirmed or clothed with possession before the annual rebellion

bellion existed; tho' it was pled, That a base infeftment is a real right without poffeffion; and albeit by the act 1540, C. 105, a posterior publick infeftment, for caufes onerous, be preferable, that cannot be extended to a right of liferent-escheat; in respect it was answered, That the superior claims the mails and duties in virtue of his own radical right to the lands, which radical right revives upon the vassal's forfeiture of his liferent; and therefore the superior is in a case as strong as any purchaser can be. Durie, 19th March 1633, *Ld. Renton contra Ld. Blackadder*. Stair, 21st February 1667, *Miln contra Clarkson*. Fountainhall, 6th December 1699, creditors of Clark *contra* Gordon of Seton.

A PARTY's annual rebellion not being wholly, after he was apparent heir by his father's decease, but most of it being run in his father's life, and before year and day expired after his father's decease, the creditors had adjudged, and charged the superior; in a competition betwixt one of them, as donatary to the escheat, and the other creditors, the Lords found, That these strict casualties are not to be extended, and therefore that the escheat could not take place in this case, and so preferred the other creditors. Fountainhall, 20th July 1697, creditors of Muirhouse competing.

LIFERENT-ESCHEAT is burdened with apprisings led upon debts existing before rebellion, and completed by infeftment within the year and day. Dirleton, 26th July 1673, Earl of Annandale *contra* creditors of Sinclair. Or by presenting a signature to the exchequer, where the apprising is led against the king's vassal, because the king cannot be charged. Stair, 27th July 1673, *inter eosdem*.—But thereafter the Lords, before answer, appointed trial to be taken *per membra curiæ*, at what time the signature was presented, and what was the cause of the delay, that infeftment was not expedite within year and day. Stair, 25th July 1676, *inter eosdem*.

A PURCHASER, who got procuratory and precept, having infeft himself base, his liferent-escheat was found to fall to the disponent, and found not evacuated by the rebel's obtaining a publick infeftment upon resignation, seeing the same was obtained after the running of year and day, and after declarator at the donatar's instance. Durie, 23d January 1624, donatar of Meldrum's liferent-escheat *contra* his superior.——Liferent-escheat of a vassal once fallen, will stand good to the superior, tho' the vassal afterwards lose his tailzied fee by incurring an irritancy. Home, 18th July 1722. Scot of Gala *contra* the personal creditors of the deceased Sir James Scot.

VOLUNTARY right granted by the rebel after denunciation, See *Litigious*.

COMPETITION betwixt a donatar of single escheat, and porteur of a bill. See *Bill of Exchange*.

WHAT is carried by a gift of escheat. See *Gift*.

GIFT of escheat when presumed simulat. See *Presumption*.

IS simulation good against onerous purchasers. See *Personal and real*.

EXCAMBION.

FOUND, That where parties excamb lands, the lands remain really affected to return to the party from whom the exchanged lands are evicted, conform to the proportion of the eviction, in which the party distressed hath recourse to his own lands *pro tanto*, in which recourse, the Lords found him preferable to all other persons who had acquired any real rights to the lands, tho' these rights preceeded the eviction; and this, because contracts of excambion are of themselves real. Durie, 25th November 1623, Earl Melrofs *contra* Ker.--- In an excambion of lands, tho' regrefs upon eviction was stipulated to the granter only and his heirs, yet the lands being evicted from a singular succeffor, he was found to have regrefs against the excambed lands, tho' the stipulation was not in his favours, *quia inerat de natura rei*. Durie, 14th July 1629, Ld. Wards *contra* L. Balcomby.

In excambion of lands, the party from whom the eviction is made, hath his option, either to seek regrefs or damages. Nicolson, (*Eviction*) 6th July 1622, Home *contra* Ker.

EXECUTION.

Warrant of execution.

Warrant how
obtained.

A WARRANT to cite at the nearest mercat-cross, where there is no *tutus accessus* to the party, ought not to be granted of course upon common bills, but by the Lords *in presentia* upon special bills. Stair, 29th June 1666, M'Pherson *contra* M'Leod.

Execution
disconform to
the warrant.

AN inhibition was found null, because served at another church than the parish-church designed in the body of the letters, altho it was offered to be proved, that the said parish-church was ruinous, and that the whole congregation went to the neighbouring church. Haddington, March 1604, Moncur *contra* Ld. Craid.---The Lords found an inhibition null, because the letters gave warrant to charge the party, being then out of the country, upon 60 days, at the mercat-cross of Edinburgh, pier and shore of Leith, and at the cross of the Head-burgh of the shire where the lands lay, but contained no further warrant, and yet the execution bore personally apprehended, for doing whereof there was no warrant in the letters, altho', by this personal execution, the pursuer had done more than was contain'd in the warrant of the letters. Durie, Hope, (*Inhibition*) 24th January 1627, Erskine *contra* Lord Erskine. Durie, Hope, (*Inhibition*) 19th March 1628, Lamb *contra* Blackburn.---Yet such an execution was sustained, being of a summons. Durie, Auchinleck, (*Summons*) 2d February 1628, Ld. Kirkconnel *contra* Ld. Barnbarroch.---And a party was held as confest upon a personal citation, tho' there was only warrant

rant for an edictal citation, because a warrant for an edictal citation includes a personal citation. Forbes, 12th June 1705, Cochran *contra* Urquhart.---An incident used by a defender against a party, called as haver, and out of the country, upon sixty days, was not sustained, because the letters bore no warrant to summon him as out of the country. Durie, *ult.* February 1629, Muir *contra* tenants.---The Lords found that a party, being within the country the time of the citation upon the first summons, (second summonses not being then taken away) and sometime thereafter, and going out of the country before the second, could not be cited at the pier and shore of Leith upon the second, without a warrant in the second summons. Dirleton, 21st June 1672, Ferguson *contra*

It being objected, That a messenger, at delivering the copy, wanted the summons, which was the warrant thereof, and being required then by the defender's advocate to shew it, the Lords found a messenger not obliged to shew his warrant to third parties not defenders, and that law presumes he had it on him, unless the contrary were proved. Fountainhall, 11th July 1699, Lermonth *contra* Gordon.

If the messenger must show his warrant.

EXECUTION of letters of intimation at the mercat-cross of Edinburgh, pier and shore of Leith, not bearing production of the assignation intimate, found null. Dalrymple, 9th December 1714, Watson *contra* Monro.

Where parties must be cited, and executions gone about.

EXECUTIONS against parties ought to be personally, or at their dwelling-houses; and therefore an execution bearing a copy delivered to the party's wife, was not sustained, unless it were added, That it was delivered to her in the party's dwelling-house. Stair, 11th December 1679, Countess of Cassils *contra* Earl of Roxburgh.---And an execution at the party's shop, by delivering a copy to his wife, was not found sufficient, unless the pursuer would offer to prove, That the shop was a part of the dwelling-house. Falconer, 1st February 1684, Anderson *contra* Anderson's tenants. Marcus, (*Summons*) January 1686, Nisbet *contra* M'Clelland.---A citation, by leaving a copy with the party's servant, in a house in Edinburgh where he lodged for the time, found null, as contrary to the 75th act, parl. 1540, which requires, That persons not apprehended personally, be cited at their principal dwelling-house. Forbes, 13th July 1708, Bruce *contra* Hall.

Execution against a party within the kingdom, must be personally, or at his dwelling-house.

A CHARGE of horning, given at a debtor's dwelling-house in the country, sustained, tho' he had lived more than forty days at Edinburgh. Stair, 11th February 1674, M'Culloch *contra* Gordon.---An advocate who had retired to the country after the session, being cited in a process at his house in Edinburgh where he dwelt the preceeding session, and which he had hired till Whitsunday, and his furniture remained in it, the citation being given in April, the Lords found the citation null. Fountainhall, 30th December 1702, Gordon *contra* Campbell.---An execution of arrestment against the Earl of Murray, at his house of Dunibersel, on the 12th July, sustained, as be-

What understood to be a party's dwelling-house.

ing the Earl's principal dwelling-house, tho' he had removed with his family in the April before, to pass the summer at his house of Darnway in the north, and preferred to a posterior execution of arrestment against the Earl, personally apprehended at his house of Darnway. Fountainhall, 13th March 1707, Irvine *contra* Deuchar.---- Citation of one not personally apprehended, by leaving a copy at the dwelling-house of another, which the execution bore to be his special residence at the time, was sustained, the pursuer proving, that he had resided there for forty days before the citation. Forbes, 22d December 1710, Baillie *contra* Menzies.

Edictal citation.

A PARTY being weak and prodigal, and within a few weeks of majority, his father also and other friends intending to get him interdicted *causa cognita*, and for that end to give him a citation before the Lords; but he being spirited away by some designing to take advantage of his weakness, so that he could not be personally cited; the Lords, upon application of his friends, considering this to be an extraordinary case, and some documents of his levity being produced, did allow an edictal citation, and appointed also the person who was alledged to have spirited him away, to be cited, and referred to the Ordinary on the bills, to try the matter of fact. Fountainhall, 7th July 1697, Cockburn *contra* Robertson.---- Found, That a vagabond may be summoned at the mercat-cross of the head-burgh of any shire, where he most commonly haunted, before the execution of the said summons. Balfour, (*Summons*) 22d February 1491, Home *contra* Libberton.---- In citing of a minor, it was found sufficient to cite his curators in general at the mercat-cross of the head-burgh of the shire where the minor dwelt, tho' neither he nor they dwelt within the jurisdiction where the lands lay, the process being a poinding of the ground. Durie, 26th July 1625, Ld. Rankeillor *contra* Ld. Aiton. The like. Forbes, 29th July 1710, Fairholm *contra* M'Kenzie.---- Tho' in a process against a minor, his tutors and curators must be cited at the head-burgh of the shire, it is otherwise in legal diligences which must be executed at the head-burgh of the regality; and therefore, a general charge executed against the minor personally, and against his tutors and curators, at the head-burgh of the regality where he dwelt, was sustained. January 1724, creditors of Sir John Houston *contra* the heir.---- A party having industriously absconded, the Lords granted a diligence to cite him edictally. Forbes, 12th June 1705, Cochran *contra* Urquhart.---- During the rebellion 1715, upon an application, that several people in whose hands the petitioner wanted to lay on arrestments were engaged in the rebellion, or did live in shires to which there was no *tutus accessus*, and therefore craved special Warrant to arrest at the cross of Edinburgh, as being *communis prætoria*, and nearest to Fife, which, and the more northern counties, were in the enemy's power; and likewise warrant to arrest at the pier and shore of Leith, and that citations in the forthcoming might proceed in the same manner. The Lords granted the supplication, the petitioner first condescending upon the persons, that they might be satisfied by sufficient documents, or their proper knowledge, that these persons did reside in shires to which there was not *tutus accessus*. Dalrymple, 2d December 1715, Ashurst and his factors supplicants.

IT was found sufficient to summon a man that was forth of the kingdom, at the cross of Edinburgh, &c. without necessity of citing him at his dwelling-house, where his wife and children still resided. ^{Party forth of the kingdom.} Had-dington, 4th July 1611, Lady Carmichael *contra* her son.---- The city of Edinburgh was found to be *communis patria*, so that citations are null, being against parties that are out of the country, if not executed at the cross thereof, tho' executed at the pier and shore of Leith, at the cross of the head-burgh of the shire, and also at the cross of the town where the party has his domicile and family; upon which account a decret of apprising was found null. Durie, 4th June 1631, Chrystie *contra* Jack.---- The Lords found a denunciation at the mercat-cross of Edinburgh, as *communis patria*, sufficient against a party out of the country, altho' the lands lay in another shire. Newbyth, 4th July 1666, Cuninghame *contra* Cuninghame.---- In a declarator of single and liferent escheat, it was objected, that the horning was null upon which the gift proceeded, because the denunciation was only at the mercat-cross of Edinburgh; whereas it ought also to have been at the pier and shore of Leith, the party being out of the kingdom. The Lords sustained the horning, because it being upon an act of adjournal of the justice-court, it is sufficient that the denunciation be at the mercat-cross of Edinburgh, as is declared by act 128, parl. 1592, Home, July 1687, Shiel *contra* Scot.---- The Lords sustained an order of redemption, tho' used at Edinburgh, notwithstanding the lands lay in another sheriffdom, this being a legal reversion near expired; but at the time of using the order, the debtor was out of the country, and Edinburgh is understood to be *communis patria*. Durie, 22d February 1631, Murray *contra* Lord Yester.---- There being a special place appointed in a reversion for consigning the money, and the wadsetter being beyond seas; the Lords granted warrant to make premonition at the mercat-cross of Edinburgh, pier and shore of Leith, &c. Auchinleck, (*Redemption*) 8th February 1632, Dyel *contra* Bruce.---- Requisition against a party out of the country ought to be at the mercat-cross of Edinburgh, pier and shore of Leith only. Gosford, 15th July 1669, Leith *contra* Earl Marishal. Gosford, 16th June 1671, Lord Lovat *contra* Lord M'Donald.

FOUND, That a party put to the horn must be denounced at the head-burgh of the shire where he resides, otherwise the denunciation is null; and this conform to the act 75, parl. 1579, notwithstanding of 100 Years uninterrupted custom to the contrary. ^{Denunciation upon a horning, where to be executed.} Colvil, June 1583, Earl Angus *contra* the donatar of his escheat. Gosford, 10th, Dirleton, 11th January 1677. Scot of Bevelaw *contra* Dalmahoy.

THE Lords found, that relaxations must be executed at the head-burgh of that same shire where the denunciation was made; otherwise they are null, and hinder not the liferent-escheat to fall. ^{Relaxation.} Gosford, 27th July 1675, Arbuthnot *contra* Barclay.

A COMPRISING was found null, because the lands lying within a regality, the denunciation was made not at the head-burgh thereof, as appointed by act 268, parl. 1597, but at the head-burgh of the shire. ^{Denunciation of comprising.} Balfour, (*Comprising*) penult February 1562, Lord Seton *contra* Earl Monteith. Marcus, (*Comprising*) January 1684, Calderwood *contra* Frank.

Inhibition at
what mercat-
cross.

AN inhibition found null upon act 268, parl. 1597, even as to lands within the sheriffdom where it was executed, because not executed at the mercat-cross of the head-burgh of the regality where the party inhibit dwelt. Durie, Hope, (*Inhibition*) 30th January 1629, Stirling *contra* Panther, January 1732, Stirling *contra* Jamieson. ---- Lands within a shire being annexed to a regality, *quoad* jurisdiction; an inhibition served at the head-burgh of the shire only, was by the Lords found valid. Gosford, 12th February 1669, Lithgow *contra* Heriot. ---- Denunciation at the head-burgh of the shire, was sustained, tho' the debtor lived within a regality; since the regality had no head-burgh in use, nor a register for hornings. Gosford, 11th, Stair, 12th January 1672, Scot *contra* Boyd. Stair, 19th June 1674, Murray *contra* Arnot. ---- The Lords sustained an inhibition, tho' not executed at the mercat-cross of the regality where the lands lay, because it was published in the usurper's time, who abolished all regalities; tho' it was alledged, that his authority could not change acts of parliament; and that, even in the English time, they were in use to publish inhibitions and other diligences at the regality mercat-cross. Fountainhall, 25th February 1680, Earls of Southesk and Northesk *contra* Lairds of Powrie, Bandoch, and others. ---- An execution of inhibition being quarrelled, because not executed at the head-burgh of the jurisdiction where the parties lands lay; the Lords desiring to make a standard in this affair *pro futuro*, did first, before answer, ordain a trial to be taken, by searching the registers how the custom lay, that they might square their decision accordingly. Fountainhall, 11th January 1710, Lord Gray *contra* Hope. After which search their Lordships having advised the cause, they found no need to execute an inhibition at the head-burgh of the jurisdiction where the lands of the inhibited person lay; but that it sufficeth, after executing against him personally, or at his dwelling-house, to execute at the mercat-cross of the head-burgh of the jurisdiction where he dwells, and record the inhibition and execution either in the particular register of the jurisdiction where his lands are, or in the general register. Which, after long debating among themselves, the Lords resolved should be a fixed rule in time coming. Fountainhall, Forbes, 14th February 1710, *inter eosd.* ---- The contrary had been found, Stair, 18th July 1662, Swinton *contra* Fountainhall, 26th July 1694, Cleland *contra* Falconer.

AN inhibition, executed against the debtor at his lodgings in Edinburgh, and against the lieges at the mercat-cross of Aberdeen, within which jurisdiction the debtor's principal dwelling-house was situate, was found null; for, without much reasoning upon the point, whether it was habily executed at Edinburgh, which the Lords inclined to think it was, if the debtor had been forty days there, they were clear, that it ought also to have been executed against the lieges at the mercat-cross of Edinburgh; and that in no case is it regular to execute an inhibition personally at a debtor's dwelling-house, within one jurisdiction, and against the lieges at the mercat-cross of another jurisdiction. 8th November 1739, Baird *contra* Seaton.

Execu-

Execution in the night-time.

IT was not found a nullity, That a charge of horning was given in the night-time. Stair, 11th February 1674, M'Culloch *contra* Gordon. ----- A poinding was found unwarrantable, not only after sun-setting, but in the morning before it rise; and therefore action of deforcement in that case was not sustained. Durie, 1st, Spotiswood, (*Deforcement*) 7th February 1628, Ld. Halkerton *contra* Keddie. ----- Poinding is not valid, unless begun before sun-set, and ended during day-light. Stair, Dirleton, 11th February 1675, Douglass *contra* Jackson. ----- The Lords agreed, that ejections could not be warrantably made in the night-time; but, in the present case, the ejection being begun with day-light, within an hour or less of the sun-rising, some of them thought it could not be called illegal, there being neither law nor decision condemning that practice; yet the plurality found the ejection illegal, being before sun-rising, and ordained the pursuer to be repossessed accordingly. Fountainhall, 28th February 1702. Fountainhall, Dalrymple, 10th November 1703, Gordon *contra* Hope.

The execution must specify the names and designations of the parties, dwelling-house, &c.

AN inhibition was found null, because, altho' the party was inhibited, according to the letters, at his dwelling-house, yet not by name and surname. Hope, (*Inhibition*) 19th March 1628, Lamb *contra* Blackburn. ----- The Lords found an execution null upon act 6th, Parl. 1672, because it designed not the pursuer, but contained only his name. Home, February 1687, Maxwell *contra* Wallace. ----- The Lords sustained an inhibition, altho' the execution was written on a paper apart, and yet bore not any designation of persons, but only, in general, *the within designed*. But this execution was some years before the act 6th, Parl. 1672; and the Lords here, having first taken trial how the stile run in those days, they found many of them conceived in the same manner. Fountainhall, Forbes, 14th February 1706, Earl Leven *contra* Nicolson and Durham. ----- The Lords sustained the execution of an inhibition, altho' it did not design the inhibitor, or party inhibited, otherways than by a general relation to the letters; and it was found, That the act 6th, Parl. 1672, relates to summonses only, not to executions of legal diligences. Forbes, 8th July 1713, Baillie *contra* Nisbets.

EXECUTION at the dwelling-place ought to name the place, otherwise it is null. Colvil, July 1582, King's advocate *contra* Burnet. Haddington, February 1609, Johnston *contra* Johnston. Fountainhall, 21st February 1693, Guillelan *contra* Watson. ----- An execution of a horning was not found null for not designing the debtor's dwelling-place particularly at which he was charged, in regard the debtor was designed by the stile of the room, at his dwelling-place there. Durie, 9th November 1632, Montgomery *contra* Ld. Fergushill. ----- In a question about the validity of the execution of a horning, bearing, to be given at the party's dwelling-house, without design-

signing the same, the Lords found, That the party's house and stile being the same, and he being designed in the execution by his stile, it must be presumed the charge was given at his dwelling-house of that name. Fountainhall, 8th, Falconer, 12th February 1684, creditors of Crichton of Castlemains *contra* his Majesty's cashkeeper. ---- But the execution of a charge of horning against a party, burges of such a place, at his dwelling-house, not adding the word (*there*) was found null, and the magistrates pursued for suffering the debtor to escape, asfoilzied. Durie, Spotiswood, (*Horning*) 14th July 1626, Adams *contra* Baillies of Air.

Execution,
if it must bear
the date of the
letters.

AN execution of letters of intimation of an assignation, &c. was sustained, altho' it was on a paper apart from the letters of intimation, and did not bear the date of these letters, which were the warrant thereof. Forbes, 16th February 1711, Forbes and his factor *contra* Watson.

Execution
not particular
as to the time
the charge was
given.

A HORNING raised against many parties, and executed upon the first, second, third, fourth, &c. days of such a month, but not relating what day each particular man was charged upon, was nevertheless sustained. Haddington, 3d June 1595, Ld. Arncaple *contra* Ld. Kilineack.

Execution by leaving a copy.

Must bear
delivery of a
copy.

A HORNING was found null which bore delivery of a ticket, containing the tenor and substance of the letters, because it bore not this word, *copy*. Hope, (*Horning*) 20th July 1627, Monteith *contra* Kirkwood.

If it must
bear that the
copy was sub-
scribed.

INHIBITION sustained, tho' the execution did not bear delivery of a subscribed copy to the party, tho' a necessary solemnity by act 141, parl. 1592, in respect the execution bore delivery of a copy, and the act does only require, that the copy be signed by the messenger, which was done, not that the execution should bear that the copy was signed. Forbes, 8th July 1713, Baillie *contra* Nisbets. Fountainhall, 15th January 1706, Loch *contra* Home.

In execution
at a dwelling-
house, how the
copy must be
left.

IN an execution of arrestment, the Lords found no necessity of affixing a copy upon the most patent door, where a copy was delivered for the party to his wife within his dwelling-house. Stair, 11th December 1679, Countess of Cassils *contra* Earl Roxburgh. ---- In a declarator of escheat, at the instance of a donatary, the Lords found the execution of the horning null; because, tho' it bore, That, after six knocks, the messenger left a copy of the letters, in regard he could not apprehend him personally; yet it did not bear with whom it was left, or, that it was affixed at the most patent door. Fountainhall, 8th July 1698, Blair *contra* creditors of Mein and Chatto. ---- The Lords sustained the execution of a summons, tho' they did only bear, copies to have been left at the door of the defender's dwelling-house, without addition of *most patent*. Forbes, 19th June 1712, Dr. Garden *contra* Anderson. ---- The execution of a warning to remove, found null, bearing only, that a copy was left at the house. Marcus, (*Removing*) February 1684, Threapland *contra* Strachan.

A CHARGE

A CHARGE given to two baillies of a regality to take a rebel then present with them, was sustained against them both, tho' the execution bore only, *That one copy was delivered to one of the baillies for himself and for the other baillie, they being both present together.* Durie, 19th November 1628, Rae *contra* Douglafs ----- In a reduction of an inhibition, served against a wife and her husband, she being fiar and heiress of the lands; and yet the copy being only given to the husband personally, but not to the wife; the Lords were of opinion, That if the copy had been given at the husband's dwelling-house, it might have been sustained as sufficient, that being likewise the wife's domicile; but being delivered to him personally apprehended elsewhere, it could not supply the defect of an execution against the wife, who had the principal interest, the husband being only *pro interesse*; therefore, they reduced the inhibition as null *quoad* the wife, tho' it was alledged, That it was all one as if it had been the copy of a summons delivered to a tutor, which would certainly serve for a citation to the minor. Fountainhall, 10th July 1702, Keir *contra* Robertson. ----- The like in the execution of a summons. Forbes, 30th June 1709, Earl Galloway *contra* Hamilton.

A copy left with one in name of another.

THE Lords in a question about the execution of inhibitions, resolved as to the future, That such executions should be null, unless copies were affixed on the mercat-cross, in respect there can be no executions, without giving of copies, either personally or at their dwelling-house; and when the lieges are inhibited at the mercat-cross in general, so that a copy cannot be given to every person, it ought to be left at the mercat-cross *in subsidium*. Dirleton, 22d December 1676, *contra* Stair, 12th February 1670, Napier *contra* Gordon. --- Execution of an apprising sustained, tho' it did not bear a schedule to be left on the ground of the lands. Fountainhall, 20th December 1705, Scrimzeour *contra* Betson. --- An objection against an apprising, That the execution did not bear a copy to have been affixed upon the mercat-cross, but only that a copy was left there, found relevant to keep the legal open, and restrict the apprising to the principal sum and annualrents. Forbes, 20th December 1710, Baillie *contra* Cunningham. --- The execution of an inhibition, bearing the affixing a copy on the mercat-cross, but wanting these words, *I left a copy*, and this being objected as a nullity; the Lords did not find the want of these words to be a nullity, unless the alledger offered to prove that the copy was fraudulently taken down. Forbes, 21st, Fountainhall, 25th July 1710, Hope *contra* Lord Gray. --- The Lords sustained denunciation upon a horning, altho' it did not bear, that a copy was affixed and left upon the mercat-cross. Forbes, 30th November 1711, Lady Semple *contra* Lord Semple. --- The Lords sustained an inhibition, tho' the execution bore not that a copy was both affixed and left at the mercat-cross, but only, that a copy was left at it. Forbes, MS. 26th January 1714, creditors of Dunbar *contra* Murray.

In local executions how the copy must be left.

A CHARGE of horning being given at the debtor's dwelling-house, he not being personally apprehended, it was found a nullity, that the messenger or witnesses did take away the copy of the charge to conceal it from the debtor, without necessity to alledge that they were instructed so to do. Stair, 11th February 1674, M'Culloch *contra* Gordon.

Copy discon-
form to the
summons.

A DEFENDER insisting in a no-procefs, because the copy signed and delivered to him by the messenger was disconform to the summons ; it was answered, That the execution must bear faith, mentioning the delivery of a just copy until it be improved ; nor is the truth of the execution redargued by the lame copy produced, which may have been made up *ex post facto* in concert with the messenger, in order to cast the procefs. The Lords repelled the objection. 11th January 1726, M'Donald of Bornakittag *contra* M'Cleod of Hammer.

Three blasts of the horn.

A HORNING bearing in its execution, That the rebel was denounced by open proclamation and put to the horn ; it was sustained, altho' it neither carried, that he lawfully denounced him rebel, nor of any blasts of the horn. Haddington, 19th January 1611, Hepburn *contra* Ld. Neddrie.---- A denunciation to the horn was sustained, altho' it made no exprefs mention of three blasts of the horn (no law exprefsly requiring it) but only, that the messenger lawfully denounced : But the messenger and witnesses being still alive, the party was ordained to prove that the three blasts were given, tho' not expressed in the denunciation : But if they had been dead, the Lords inclined to sustain the denunciation without necessity of such probation. Durie, Spotiswood, (*Horning*) 4th March 1624, Drysdale *contra* Ld. Sornbeg and Ld. Langton. The like. Spotiswood, (*Horning*) Durie, Hope, (*Horning*) 22d March 1626, Somervell *contra* Ld. Edmonston.

Publick reading and oyesfes.

THE Lords annulled a horning, (in a declarator of escheat) because the denunciation bore only thee oyesfes instead of three oyesfes ; so that there was nothing wanting but the letter (*r*). Fountainhall, 20th February 1680, Gordon *contra* Gray.---- The Lords sustained the execution of an arrestment at the mercat-crofs, &c. against a party, tho' wanting the intimation of three oyesfes ; because in a former case observed by Lord Stair, 15th February 1681, Gordon *contra* Forbes, the Lord Register being ordained to try the custom as to the oyesfes, it was found to vary ; and tho' an act of sederunt was then intended, appointing the oyesfes for the future, yet it was not done. Fountainhall, 7th December 1698, Yeaman *contra* Trotter.---- Execution of apprising sustained, tho' it bore not three oyesfes, but only several oyesfes. Fountainhall, 20th December 1705, Scrimzeour *contra* Betson. An Inhibition found null, because the execution thereof at the pier and shore of Leith did not bear three oyesfes, nor publick reading thereof. Dalrymple, Bruce, 22d February 1715, Sir John Clark *contra* Preston.---- An inhibition sustained, tho' the execution at the mercat-crofs bore only *three oyesfes, open and publick reading*, and wanted the words *open proclamation* ; in respect it was alledged, that three oyesfes and publick reading, imports *open proclamation* ; and after trial, the stile of many executions of inhibition were found to run in the same tenor. Fountainhall, Forbes, 14th February 1706, Earl Leven *contra* Durham of Largo and Nicolson of Trabrown.

AN

Six knocks.

AN execution of a horning was reduced, because it contained not the six knocks. Colvil, December 1589, Menzies *contra* .
 --- Execution of an inhibition, bearing to be *at the dwelling-house*, was found null, bearing only, that *several knocks* were given at the door thereof, and not bearing expressly *six* knocks, as is prescribed by act of parliament. Stair, 29th July 1680, Hay *contra* Ld. of Powrie.
 --- In a declarator of escheat, this nullity objected against the execution of the horning, *viz.* that it did not bear the messenger to have sought entrance before the giving of the six knocks, was repelled, because this would overthrow the most part of the executions in Scotland, and therefore found this formality sufficiently included in the six knocks. Fountainhall, 30th July 1696, Sinclair *contra* Lord Bargeny. --- The like with regard to the execution of an apprising. Fountainhall, 20th December 1705, Scrimzeour *contra* Betson. --- The Lords found the execution of an inhibition null, because it bore three knocks only to have been given at the most patent door of the person's house against whom the letters were executed; and the act 75th, parl. 1540, requires the giving of six knocks, where the messenger cannot get entry; altho' the certification expressed in the statute for not observing that formality is imprisonment, and an arbitrary punishment of the officer contravening. Forbes, Fountainhall, 24th June 1707, Gordon *contra* Duff. --- In an execution of arrestment, found no necessity of knocks where the doors were patent. Stair, 11th December 1679, Countess of Cassils *contra* Earl of Roxburgh. --- The Lords sustained a citation, tho' not mentioning six knocks given conform to law, and tho' it did not bear personally apprehended, but only a copy left with some of the family at the defender's dwelling-house. Fountainhall, 17th July 1702, Biggar *contra* Wallaces.

Stamp.

A HORNING was found null, because no vestige of a stamp appeared, altho' the execution bore, in common form, that the messenger had affixed his stamp. Durie, 6th March 1624, Stewart *contra* .
 --- The Lords found, that the Executions of an inhibition not being stamped conform to the act 82, parl. 1469, and act 74, parl. 1540, were null, with the inhibition, and all following thereon, *quoad* a third party acquiring *bona fide* after the inhibition. Fountainhall, 4th February 1681, Van Lovan and his factor *contra* Bruce. Home, February 1687, Maxwell *contra* Wallace. --- Before stamping of executions was declared unnecessary by the act 4, parl. 1686, the Lords reduced a horning, and found it null, because there was no print nor vestige of a stamp on the execution. Fountainhall, 12th February 1686, Lord Livingston *contra* Lord John Hamilton. --- It being objected as a nullity in a horning, that tho' the executions bear to be stamped, yet no vestige of the stamp appears, and the executions are but a recent deed *in anno* 1682. Answered, in fortification of the execution asserting it self to be stamped, it is offered to be proved, that at
 3 X 2 the

the outgiving of the process a vestige of the stamp did appear. The Lords found the answer relevant. Marcus, (*Horning*) 10th February 1688, Mr. John Buchanan *contra* the nearest of kin of Ker.

Denunciation upon a horning.

IT being objected as a nullity of a denunciation, that it bore not the messenger to have read at the mercat-cross the execution of the horning, as he did the horning itself, and as was constantly in use to be done, conform to a testificate under the hand of the keeper of the register of hornings. The Lords found, That there was no express law nor act of parliament requiring that solemnity, and that the custom was not come to be so fixed as to be obligatory, there being denunciations both ways; and tho' some cautious messengers adjected that formality, this was not enough to make it grow up to an universal uniform practice; therefore they repelled the nullity, and sustained the denunciation. Fountainhall, 18th July 1702, Bogle *contra* Armors.

Execution against a body-corporate.

IN a process against the York-building company, this objection was proponed, That both summons and execution were void, being against no person whatever, by name or designation, but in these general terms, *the governor and company*. Answered, The defenders are a body-corporate named in their charter in the terms they are summoned, and authorised to sue and defend in that character, and are thus designed in the contract libelled. This was pled to difference the case from that of a burgh-royal, in whose contracts the provost, baillies, &c. are expressed by name, and so ought to be cited by name. The Lords repelled the objection, and sustained process. January 1733, Sir Alexander Murray of Stenhope *contra* York-building company.

Inchoate diligence not carried on, if it falls by lapse of year and day.

IT was found no nullity in a horning, that the denunciation was more than a year after the date of the charge. Haddington, 13th March 1610, *contra* Earl of Orkney. --- Inhibition sustained, altho' the execution against the lieges at the mercat-cross of the regality was more than a year subsequent to the execution against the party. Durie, 17th July 1627, Ld. Fairnie's bairns *contra* Ld. Aiton. --- Summons fall, if not called within year and day. See Process.

Execution of a charge to enter heir.

A DECREE *cognitionis causa* in order to adjudge, proceeding on a charge to enter heir, yet the execution wanting these words, *That he charges them to enter heirs within forty days, conform to act of parliament, Ja. V. with certification, that sicklike execution shall pass against them,*

them, as if they were actually entered; tho' the execution bore to proceed on a general charge, and summoned them to the effect within written; nor was the objection made at obtaining the decret *cognitionis causa*, neither was the reduction of the adjudication following thereupon raised to annul it *in totum*, but only to cut off the odious accumulations. The Lords found, the execution of the general charge to enter heir null; yet, since it was not quarrelled at the time, they found it could not annul the adjudication *in totum*, but only restrict it, and cut off the legal and accumulations. Forbes, 21st, Fountainhall, 22d June 1710, Strachan *contra* master of the mortifications in Aberdeen.

Form of arresting a ship.

ARRESTMENT of a ship upon an admiral precept is good, if intimated personally to the possessor, tho' the officer who executed the arrestment neither take the sails nor rudder from the ship in the usual manner, according to the direction in the precept, nor leave a copy of the arrestment affixed on the ship, nor deliver a copy of it to the debtor. Durie, 22d March 1637, Finnie *contra* Gray.

Executions that require not the ordinary solemnities

A CITATION of a tenant to his master's baron-court, needs not be by giving a written execution, and may be improbated by witnesses. Durie, 11th July 1634, Hay *contra* Gicht. --- Verbal warning at the house within burgh, is sufficient to support an action for removing, without any written execution, or publication at the parish-church, Durie, 18th July 1634, Hart *contra* tenants.

Executions bearing in general to be lawfully gone about.

AN Inhibition was found null, the execution not bearing the publick reading of the letters at the cross and three several oyeses; tho' it bore, that the messenger lawfully inhibited the lieges. Gosford, 10th, Stair, 11th July 1676, Stevenson *contra* Innes. --- A decret twenty years old, being quarrelled, because it did not bear the party to be personally apprehended, but only, that he was lawfully cited, the Lords repelled the objection, the party being lawfully cited to give his oath, and he could not be lawfully cited, unless personally apprehended; and 'tis presumed, that *omnia erant solenniter acta*, unless it were made appear by production of the execution that the defender was not personally apprehended. But reduction was reserved as accords. Dirleton, 29th January 1675, M'Intosh *contra* M'Kenzie. --- Execution of inhibition against the party inhibited found null, not bearing the delivery of a copy, but only that the debtor was inhibited personally apprehended. Stair, 28th July 1671, Keith *contra* Johnston. --- An expired comprising was found null, where the execution of the letters bore not the delivery of a copy to the debtor, but only that

he was personally apprehended and lawfully warned. Falconer, Marcus, (*Comprisings*) 23d November 1681, Sanders *contra* Jardin. ---- An execution of arrestment, bearing that the letters were duly and lawfully executed against the party personally apprehended, but not that a copy was left, found null and informal. Marcus, (*Arrestment*) February 1682, Mr. James Cuninghām *contra* M'Leod and Hamilton. ---- The execution of an inhibition, bearing personally apprehended, yet not mentioning that a copy was delivered, being quarrelled as null, the Lords found, That the want of these words in the execution, *that he delivered the party a copy*, was not a sufficient nullity; but was supplied by these words, That he lawfully inhibited him personally apprehended; which word (*lawfully*) imply'd, that all solemnities were legally adhibited; law presuming *pro instrumenti veritate*. But divers of the Lords thinking this too great a latitude to messengers, making them judges of what was legal execution; therefore, left this decision should prove dangerous, the Lords, a few days thereafter, ordained the custom and general stile of such executions to be tried in the registers, and upon a report made, that about the time of executing that inhibition, many others were found to have been executed in the same manner, the Lords adhered. Forbes, 16th, Fountainhall, 18th November 1709, Crombie *contra* Robertson. ---- Execution of an inhibition, bearing "several knocks, and that the party" was lawfully inhibited," found null, for wanting of *six knocks*. Stair, 19th November 1680, Hay *contra* Lady Ballegerno.

Clauses implying or importing particular legal steps of execution.

AN execution of a charge was sustained, altho' it bore not that the messenger charged the party personally apprehended, seeing it bore that he delivered a copy to the party, which implied a personal execution. Durie, 22d July 1626, Stewart *contra* Achanay. ---- An inhibition was found null, the execution not bearing a copy affixed at the pair of Leith, but at the cross of Edinburgh, tho' it bore *a copy left at the mercat-cross of Edinburgh, before these witnesses, &c. at the mercat-cross of Edinburgh, and pier and shore of Leith* respective; which was not found to import leaving of a copy. Stair, Fountainhall, 22d February 1681, Ewing *contra* Burnet and Rothead. ----- The execution of a horning against one not personally apprehended, was, sustained, altho' it bore not expressly, that the messenger left a copy, but only that he left a *just and authentick* in the lock of the most patent door of the party's dwelling-house, which could import nothing but a copy. Forbes, 23th February 1709, Earl of Seafield *contra* creditors of Boyne. ----- Found that the execution of a denunciation bearing three oyeses, did import open proclamation and publick reading. Marcus, (*Messengers*) November 1683, Baillie *contra* Mr. Alexander Dunbar. --- An execution of an inhibition was sustained, tho' it wanted three oyeses, bearing the publick reading and open proclamation, which last did import three oyeses. Fountainhall, 14th February 1694, Morison *contra* Sir John Dempster.

Execution

Execution returned blank to the party.

AN execution being signed by the messenger and witnesses blank, and so transmitted to Edinburgh, and there fitted up by the agent, which was then a common practice; the Lords were all clear, that it was *prava consuetudo*, and of ill consequence; yet thought, that the preparative might be as dangerous on the other hand, for it had been generally done, and *error communis jus facit quoad præterita*; otherwise, the half of the decreets and processs in Scotland might be annulled; they therefore repelled the nullity, without prejudice of improbating the execution as accords; but resolved by an act of federunt to discharge the practice in time coming. Fountainhall, 9th January 1700, Abernethy *contra* Ogilvie. --- An execution being signed blank by the messenger and witnesses in the country, and sent blank to Edinburgh, where it was filled up with a formal execution; only the messenger had sent along with the blank a short note or minute under his hand, containing some few of the essentials of an execution, the Lords sustained the execution, unless the other party would prove by the witnesses inserted, that the solemnities of six knocks, leaving a copy &c. were not used; but for time to come, the Lords thereupon made an act of federunt, discharging such blank executions under pain of nullity, besides deprivation of the messenger. Fountainhall, 28th June 1704, Sinclair *contra* Sinclair.

Verbal citation.

DECREET of the sheriff was found null, being upon a verbal citation only; for tho' of old, when writing was rare, verbal citations were allowed, as to this day they are in baron-courts, yet now since writing is common, and that the act 5th, parl. 1681, and act 12th, parl. 1693, require subscribing witnesses to executions of messengers, verbal citations are not to be sustained. Fountainhall, 19th July 1694, M'Kean *contra*

INHIBITION of tiends, where to be executed. See Tack.

FORM of the execution of warning. See Removing.

IF a messenger is allowed to mend his execution after being produced in judgment. See Litigious.

FORMALITIES of execution, as to witnesses insert and subscribing. See Writ.

UPON what number of days must citation be. See Induciae legales.

DEFECTS in executions, how far suppliable by witnesses. See Proof.

EXECUTIONS by deprived messengers. See Consuetude.

EXECUTIONS of inhibition must be signed by the clerk. See Registration.

EXECUTOR.

Who entitled to the office.

A LADY having a general disposition to all her husband's moveables, the Lords, in a competition for the office of executry betwixt her and her husband's nearest of kin, preferred the latter; because they thought, that her disposition from her husband to the moveables, was, at most, but an universal legacy, which never excludes the executor from confirming. Fountainhall, Dalrymple, Forbes, 27th January 1708, Lady Harden *contra* Scot.

Cannot be two confirmations of the same subject at the same time.

THERE cannot be a second principal confirmation of the same subject, and therefore the first confirmation of the ware contained in a certain shop, tho' only general, was preferred to a second confirmation of the same, condescending upon the particular ware. Stair, 18th January 1662, Fairholm *contra* Bisset. --- A sum due to a defunct, falling to three brothers and a sister equally as nearest of kin; and one of the brothers preventing the rest, by confirming himself sole executor to the whole sum, and then assigning the same; and thereafter the other three, upon notice of this, also confirming themselves, both parties having charged the debtor; the Lords in a suspension of multiple-poining, thought that the nearest of kin had not taken the habile way of affecting the sum in question by a second confirmation, since the commissaries ought not to make two principal confirmed testaments to the same subject; but that their legal method was, to have raised a process against the executor confirmed, to denude of their shares of the executry goods, and on that dependence to have arrested in the debtor's hands; however, the Lords in this case found, That the executor could not assign the whole, so as to prejudice the other nearest of kin; and therefore found the assignation null as to their parts of the sum assigned, so that the right returning to the cedent, as if it had never been out of his person, the others could oblige him to denude, and, upon his assignation, force the debtor to pay them their shares. Fountainhall, 28th January 1704, Robertson *contra* Balnaves.

Form of confirmation.

A CONFIRMATION of a debt due by a debtor named, was sustained, tho' neither the sum nor the security was condescended on, and therefore a second particular confirmation of the same subject was found null. Fountainhall, 8th December 1693, Lady Kinfauns *contra* her husband's creditors. --- A wife being confirmed executrix *qua* nearest of kin, the husband, who was also conjoined in the confirmation *for his interest*, did, after his wife's decease, lead an adjudication upon one of the bonds confirmed; many years thereafter, in a competition of creditors, the adjudication was objected to, as deduced by a person who had no right to the debt, the husband being only confirmed for his interest, which was at an end by the death of his wife. When the question came before the Lords, an enquiry was ordered into the practice of the commissary-court, with regard to the confirmation of married women

women ; it was reported as the practice of that court, for the wife only to be confirmed ; and upon this the adjudication was sustained, seeing it appeared, that the husband was confirmed joint executor with his wife, and the office behoved to accresce to him after her decease. 8th November 1738, Ewart *contra* creditors of Newlaw.

THE Lords sustained a testament, tho' it bore not that the executor at the confirmation made faith and deponed on the inventory, but only that it was faithfully made and given up by him, altho' the instructions to the commissaries require executors to make faith. Forbes, 10th December 1707, Lees *contra* Dunwoodie. --- In a process against an executrix, which resolved into a compt and reckoning, and the pursuer alledging, he was not bound to compt till she renewed her caution to the commissaries as executrix, her former cautioner being dead ; the Lords ordained her to renew her caution before the pursuer should be obliged to compt to her, tho' her former cautioner was her father to whom she succeeded *in universum jus*. Fountainhall, 9th December 1709, Menzies *contra* Wood.

Executor must make faith, find caution, &c.

FOUND, That an executor cannot renounce the office, if he has had the least intromission, *quia res non est integra*. Balfour, (*Executor*) 28th June 1561, Learmont *contra* Home. 7th March 1569, Alexander Murray's renunciation.

Executor may renounce *rebus integris*.

AN executor is but a trustee, and cannot gratuitously discharge debts owing to the defunct. Home, December 1721, Kinloch *contra* Blair. --- Nor uplift in prejudice of an assignation granted by him, after the same is intimated ; tho' an executor, before he make the debt his own by taking decret in his own name, cannot assign *cum effectu*. Stair, 24th November 1674, Buffie *contra* Arnot.

Cannot gratuitously discharge, nor uplift in prejudice of his assigney.

THE relict has no action against the defunct's debtors for her third, she must pursue the executors, or confirm herself executrix-creditor, if there be no executors. Haddington, 13th March 1612, Ld. Dunduff *contra* Ld. Cragie. Durie, 14th February 1622, Steven *contra* Govan. 7th July 1625, Falconer *contra* Irvine. 9th December 1628, Mackie *contra* Dunbar. Forbes, 12th December 1712, M'Aulay *contra* Bell. --- The contrary once found, *viz.* That the relict had a direct action against a debtor for her third of a bond, due by him to the defunct. Durie, 11th March 1623, Dougal *contra* Henderson. --- And a bond being conceived to husband and wife and longest liver, the relict was allowed direct access against the debtor for payment of the annualrents. Here the husband died before the term of payment, and the subject consequently moveable : But it is not clear from the decision, whether the husband's executors had confirmed this subject, if not, the relict no doubt had a direct interest, needing no confirmation. Durie, 7th July 1625, Falconer *contra* Irvine. --- A *legatum nominis* being left, the executor nevertheless, and not the legatar, was found to have right to pursue for it, because the debt, quot, &c. must first be deducted, Maitland, 23d March 1564, executors of the bishop of Dunblain *contra* . --- A legatar cannot pursue the debtor for his legacy, not being *speciale legatum*, where there is an executor confirmed, unless the executor omit to confirm the same. Had-

The executor has the only title to intromet with the subjects confirmed.

dington, Hope, (*Legacy*) 4th February 1623, Leitch *contra* Bonimone. --- There being a *legatum nominis* left with power to the legatar to pursue for the same himself, and the executor not having confirmed, but omitted the same; the Lords found the executor ought to confirm, and add the same to the inventory, and make the legatar assigney thereto, or lend his name to pursue for the same; and that the legatar should have the expence of the pursuit paid him by the executor out of the first free goods. Durie, 2d December 1628, Pool *contra* Morison. --- Yet action was sustained at the instance of an universal legatar against an intrometter with the defunct's effects, the executor confirmed being called in the process. Durie, 20th February 1627, Bisset *contra* Bisset.

Cannot safely
pay till war-
ranted by a
lawful sen-
tence.

AN executor cannot safely pay, unless upon decret, so that he may have a sentence for his warrant. Stair, 18th November 1675, Binning *contra* Hamilton. --- And this, tho' the debt he has paid be instructed by writ. Stair, 11th November 1664, Johnston *contra* Lady Kincaid. --- A father having disposed to his daughter the half of his free goods at his death, and she having intromitted without confirming, a demand was made upon her by one of the defunct's creditors, upon a clause of warrandice; and it was found relevant, that she had paid the value to other creditors before interpellation by her present party, tho' she had paid without sentence. Stair, 15th June 1681, Baird *contra* Robertson. --- Yet an executor nominate, having expended the little free gear in the defunct's testament that remained over the expence of his funerals, upon the education of his younger children, in respect no debts appeared; and many years thereafter, being pursued by a creditor of the defunct's, who insisted, that the children could have no claim, whether as legitim or dead's part, *nisi deductis debitis*, and that the executor ought to have exacted *cautio mutiana*, at least ought not to have paid without decret. The Lords decerned against the executor, tho' the children were insolvent. Marcus, (*Executry*) January 1685, Ross *contra* Bruce.

Can he state
a debt paid
without sen-
tence *pro rata*?

THE executor who paid the debt without decret, was allowed to come in *pari passu* with the other creditors doing diligence. Durie, 16th June 1637, Anderson *contra* Montier. --- But this was afterwards refused to the executor, and the debt totally rejected. Dirleton, 8th June 1677, Patrick *contra* Anderson.

May pay
privileged
debts, without
sentence.

THE executor is in safety to pay privileged debts, and debts given up by the defunct in his testament without a sentence. Haddington, 5th December 1609, Leith *contra* Leith. Stair, Gosford, 7th June 1677, Andrew *contra* Anderson. --- And may pay servants fees, and funeral charges, upon a simple receipt, and such payment will exoner. Home, February 1683, Littlejohn *contra* Littlejohn.

Must pay
primo venienti.

A legatar pursuing the executor at the distance of more than ten years after the defunct's decease, the Lords found no necessity for the legatar to find caution to free the executor at the creditors hands, seeing the legatar's decret was sufficient warrant to the executor. Auchinleck, (*Legacy*) 29th March 1627, Craigmillar *contra* Rollock.

AFTER

AFTER intending action against the executor, he is not at liberty to prefer another creditor, and if he make payment to another creditor, even after decret recovered against him, it will be no exoneration; and therefore, if there is not sufficient to answer both, he ought to raise a multiple-pounding. Durie, Spotiswood, (*Executor*) Auchinleck, (*Executor*) 16th December 1629, White *contra* Lady Yester. Durie, 5th December 1626, Jeffray *contra* Gray. Spotiswood, (*Executor*) 2d December 1628, Lyle *contra* Hepburn. --- The same found, tho' the debt paid was acknowledged by the defunct in his testament. Durie, *ult.* March 1624, Ld. Curriehil *contra* executors of Cumming.

After interpellation by one creditor, cannot pay to another even upon decret, but ought to raise a multiple-pounding.

A CREDITOR of the defunct having arrested in the executor's hand, which he could not regularly do after his debtor's decease, yet this was found a sufficient notification of the debt, and interpellation, after which the executor was not at liberty to prefer others. Durie, 14th June 1625, Coupar *contra* Lady Hatton. --- But tho' the executor so far acknowledge a creditor as to make a partial payment, this was not found to bar him from making payment to other creditors, and exhausting the testament thereby. Spotiswood, (*Executor*) Durie, 16th July 1629, Telfer *contra* Wilson. Found, That an executor cannot pay even upon lawful sentences in prejudice of debts given up as due by the defunct in his testament; but that he ought to exoner himself, by raising a multiple-pounding. Nicolson, (*Exoneration*) 28th March 1621, Scougal *contra* Horseburgh. Durie, Spotiswood, (*Executor*) 8th March 1631, Duff *contra* Alves.

What understood sufficient interpellation.

Goods confirmed in a testament may be proved by witnesses to be *male appretiata* at the instance of an executor *ad male appretiata*, notwithstanding of the oath given as to the value by the principal executor in the confirmation, that being only an oath of credulity. Marcus, (*Executry*) March 1683, Lady Hafelside *contra* Littlegill. --- A principal executor was found obliged, at the instance of an executor *ad omiffa* & *male appretiata*, to give his oath, both upon subjects omitted, and upon the wrong appretiation of these confirmed: For, tho' he had formerly deponed, further subjects might have since come to his knowledge; and as for the values put upon subjects in a confirmation, they are but conjectural, and the executor may come thereafter to a more exact knowledge of the values. Stair, 18th July 1667, Ker *contra* Ker. --- The estimation put upon the goods by the testator himself must be the rule; in which case, there is no place for an executor *ad male appretiata*. Gosford, 2d February 1672, Martin *contra* Nimmo. --- The same must be the rule in compting with creditors who will not be allowed to prove a higher value, unless the lesion be enorm, as if the defunct had apprised the goods within a half of the true avail. Stair, 1st February 1662, Belshes *contra* Belshes. --- He who is cautioner for an executor in confirmation of a testament, will not only be decerned to make the goods and gear confirmed forthcoming to the creditors, at the prices confirmed in the testament, but also for other great prices, if the goods be decerned to be of greater value than the prices confirmed. Haddington, 19th July 1610, Paterson *contra* Bannatyne. --- In a pursuit for a coffer at the executor's instance, who had confirmed the same at a certain value, the defender

The appretiation in the confirmed testament is but a presumptive rule, which may be corrected by a confirmation *ad male appretiata*, or by a proof at the instance of the creditors, &c. of higher values.

offered to pay the said value, and insisted, if the executor alledge it to be worth more, he must add the same to the testament. The Lords sustained process, and found the executor needed not add the greater price to the testament until the coffer were exhibited, that he might know at what further value the same should be confirmed. Durie, 24th November 1627, Gourlay *contra* . ---- An executrix was found liable to accompt for the goods, corns, and others at the values given up in the confirmed testament, tho' the corns did not amount to what they were given up; and the goods were truly sold at less prices, tho' at the time of the confirmation she had protested only to be liable for the prices she should get for them, and that after the confirmation they were appraised at less by unsuspicious witnesses. Durie, 10th March 1632, Ld. Ludquharn *contra* Ld. Haddo. ---- The inventory given up by the executor must be the rule of the charge, unless he prove that it was given up at random, and was truly less. Fountainhall, 7th February 1679, Pearson *contra* Wright. ---- An executor is but a trustee, and must not only hold compt for the principal sums confirmed, but also for annualrents arising due after confirmation before uplifting; whereby the legataries came to get payment, tho' at the date of the confirmation the inventory was no more than sufficient to pay the debts. Home, January 1721, Rae *contra* Brown.

Bound to
communicate
cases,

AN executor being a trustee, if he transact any debts due by the defunct, cannot take the benefit of the cases to himself, but the same must accrete to the creditors and others to whom he must accompt; and so cannot discharge himself with more than the sums truly paid. Fountainhall, 15th July 1709, Farquhar *contra* Paton. Forbes, 16th, Fountainhall, 19th December 1710, Elphinston *contra* Paton.

Every creditor may take
decreet, and the defence of
exhaustion will be reserved
contra executionem.

IN a Process against an executor, it will not be sustained as a defence, that decreets are already taken against him to the extent of the inventory, unless he has also made payment conform. The creditor will be allowed to take his decreet, and make the best of it in competing with other creditors. Nor does the executor suffer; he has a remedy, by suspending upon multiple-poinning, when diligence is raised upon the decreet. Durie, 8th July 1634, Preston *contra* executors of her son.

If an executor die before obtaining sentence, there is place for an executor *ad non executam*.

AN executor is but a trustee, and if he die before executing the testament, by obtaining decreets in his own name, his trust-right must die with him; and there must be a new confirmation, as if the former never had been. Fountainhall, 29th November 1677, Isbrand and Shinks *contra* Earl of Roxburgh.

Diligence raised by the principal executor, will it accrete to the executor *ad non executam*?

UPON which footing, an executor confirmed having raised process, and taken out an act of litiscontestation against a debtor of the defunct's, and thereafter dying *pendente lite*, it was found, That his executor could not obtain transference of this action, because he had died before the testament was executed; neither could he obtain it, as executor to the first defunct, because the action was not intended at his instance; so that the action was lost, and the pursuer behoved to intent one *de novo*, as executor to the first defunct. Durie, 20th February 1627, Duke of Lennox *contra* Cleland. ---- An executor-creditor discerned

cerned but not confirmed, having taken a licence to pursue and execute an inhibition upon the depending process, tho' his office fell, he dying before confirmation, yet the diligence done by him was found effectual to be taken up and followed forth by the next executor who should make up titles to the subject. For inhibition once *rite* led, becomes a real accessory of the debt, and must go along with it, to whomsoever conveyed. Fountainhall, Dalrymple, 24th December 1703, Carnwath *contra* Jackson. But it would appear, that this has been afterwards altered. Forbes, 30th June 1705, *inter eosd.* — And if the executor has granted Assignation of any of the Subjects confirmed, the assignation must fall of course by his death, unless sentence be recovered. Marcus, (*Executry*) 16th February 1682. Somervell *contra* Earl Lauderdale.

A COEXECUTOR dying before sentence, the office accresces to the surviving executor. Balfour, (*Executor*) 14th March 1548, Culrofs *contra* Balvaird. Durie, Spotiswood, (*Executor*) 23d July 1625, Aitken *contra* Hewart. Fountainhall, 6th December 1693, Beek *contra* Crawford. — The like, where the coexecutor by decret of the commissaries was secluded from the office. Durie, 26th June 1629, Young *contra* Murray.

FOUND, That a testament is to be reckoned as executed, and no place for a *non executata*, when a decret is recovered against the debtors, tho' the executor die before he get payment. And the reason is, that possibly the executor has raised diligence upon his decreets, and denounced the debtors, upon which annualrent is due; possibly he has gone on to comprise the debtor's lands; and it would be absurd that all these diligences should vanish, which behoved to be the case, if there were place for a confirmation *ad non executata*, seeing the decreets and diligences could not be transferred or settled in the person of the executor *ad non executata*, who represents the defunct only, and not the executor at whose instance the decreets are obtained. Dirleton, 16th November 1666, Reid *contra* Telfer. Stair, Newbyth, 17th November 1666, Downy *contra* Young. Gosford, 21st November 1671, Collinson *contra* Ld. of Drum. — Two executors having obtained decret against a debtor of the defunct, the one executor dying, the other charged for the whole; which the Lords sustained, seeing the testament was executed by a sentence; in which case, the other executor's representatives needed not be called. Stair, 25th January 1665, Menzies *contra* Ld. Drum. — The contrary afterwards found, and the deceas'd executor's half determined to belong to his executors, and not to accresce to his coexecutor, tho' they were *conjuncti* both in the office and in the decret. Stair, 22d June 1671, Gordon *contra* Ld. Drum.

AN executor is a trustee, and when he takes decret against a debtor it is still *qua* trustee: Upon which footing, while the defunct's effects are *in medio* unuplifted, his nearest of kin, creditors, &c. will still be preferable to those deriving right from the executor. Thus, an executor having taken decret in his own name against the defunct's debtor, and then dying without uplifting, in a competition betwixt a donatar of his single escheat and the nearest of kin of the first defunct, the Lords preferred the nearest of kin. For tho' by taking decret,

What if there be a coexecutor?

If the executor die after obtaining sentence?

Yet by obtaining sentence he does not become proprietor, nor can the executor be attack'd for his debts.

the right is so far established in the executor's person, that the office will transmit to his representatives; yet, *quoad* the property, it is no more his after decret than before. Stair, Gosford, 21st December 1671, Gordon *contra* Ld. Drum.

Confirmati-
on of an exe-
cutor *qua* near-
est of kin, is a
complete title,
and no place
for a *non exe-*
cuta, tho' he
die before exe-
cution.

AN executor *qua* nearest of kin confirming, is in a different case from a simple executor. A trust-right, or procuratory granted for the behoof of others, must die with the trustee. It is otherwise where the procuratory is *in rem suam*, which is the case of the executor *qua* nearest of kin. A confirmation of an executor *qua* nearest of kin, is nothing else but a legal procuratory or assignation, with the burden of debts, granted by the law, which never dies; which being *in rem suam*, may be followed forth as a *jus quæsitum* by the executor his representatives or assignies. And, as the law never gives a second assignation while a prior is in force, there can be no place in this case for an executor *ad non executam*, tho' the nearest of kin should die before obtaining sentence. 24th June 1737, Mitchell *contra* Mitchell of Blairgorts. See Marcus, (*Executry*) 6th November 1686, Colonel Graham of Claverhouse *contra*

Act 1617, a-
nent retention
of the third.

THE third of dead's part due by the act 14, parl. 1617, for executing the office, is only competent to stranger executors nominate, not to executors dative, *qua* nearest of kin. Stair, 28th November 1676, Ker *contra* Ker. --- A relict being executrix nominate, has no right to a third of the dead's part. Fountainhall, 26th December 1704, Robertsons *contra* Baillie. --- The like. Marcus, (*Executry*) 27th January 1688, Inchdarny *contra* Napier. --- The contrary was found, Nicolson, (*Dead's part*) 6th December 1632, Douglas *contra* Lumfden. --- Stranger executors have a third of the dead's part for executing the testament; but this is only in case there be so much free, all debts and legacies being deduced. Durie, 29th November 1626, Forsyth *contra* Forsyth. Durie, 9th July 1631, Wilson *contra* Ld. Tinto. Stair, Gosford, 15th January 1674, Paton *contra* Lishman. Stair, 25th January 1681, Bathgate *contra* Bowdown.

A MAN having left a stranger executor and universal legatar, in a process against him, at the instance of the nearest of kin, the Lords found the whole gear to belong to the defender, without any deduction, notwithstanding the act of parliament 1617, which was found not to debar any person from leaving his effects to any person he pleased. Durie, 15th July 1626, Oliphant *contra* Oliphant. --- An executor cannot have both a third of the confirmed testament and his legacy besides, but may chuse the most beneficial. Fountainhall, 25th January 1681, Legataries of Arnot *contra* Lindsay.

EXECUTORS if they can pursue, or be pursued separately. See Solidum & pro rata.

IN what cases liable for annualrent. See Annualrent.

WHO is executor qua nearest of kin. See Succession.

DILIGENCE prestable by executors. See Diligence.

EXE-

EXECUTOR's oath, if good against creditors. See Proof.

EXECUTOR may pay himself in the first place. See Payment.

CREDITORS have a direct action against the intrometter with goods left out of the inventory, without necessity of confirming ad omnia. See Service and Confirmation.

EXECUTOR-CREDITOR.

AN heir having made himself liable to his predecessor's debt by entering, the creditors, tho' they recovered no decret against him upon the passive titles, were found sufficiently intitled upon their simple grounds of debt to confirm executors-creditors to him after his decease. Forbes, 26th December 1705, Dickie *contra* Cowie. Title of confirmation.

IN a question, If a creditor having an heritable bond whereon he is infest, may seek to be confirmed executor-creditor to his deceased debtor? the reason for the affirmative was, That he had in his bond an obligation to pay, and he had action against the executors in his option, as well as against the heir; *ergo* he might be executor. But the Lords thought, that if a creditor on an heritable bond sought the office, he was not preferable, because an heritable debt cannot be the subject of confirmation *passive, ergo nec active*. Fountainhall, 17th December 1686, *contra*. If an heritable bond can be the foundation of a confirmation.

AN executor-creditor is but a trustee, as well as a simple executor; but then he is a trustee principally for his own behoof; the law, which never dies, gives him a procuratory *in rem suam*, which is not a simple trust to die with himself, but may be followed forth by his representatives as a *jus quæsitum*: And, as a decerniture and confirmation is truly an assignation to the subjects confirmed in security and payment of his debt, there can be no place for a new assignation or confirmation *ad non executam*, tho' he die before sentence. 24th June 1737, Mitchell *contra* Mitchell of Blairgorts. Tho' an executor-creditor die before sentence, no place for a non executam.

AN executor-creditor must do diligence. See Diligence.

EXECUTRY.

FOUND, That provisions made in favours of the children of a first marriage, is a debt that affects the defunct's whole goods, as any other debt does, and that it ought not to be taken off the two thirds of the moveables to make the second wife's third free thereof, but that it ought to be taken off the whole *in cumulo*. Durie, 17th November 1638, What debts affect the whole head, what the dead's part only?

1638, *Frazer contra Bishop*. --- A clause of conquest in a contract of marriage, in favours of the children of the marriage, must come off the whole head : And therefore, a second wife, insisting for her legal third, was found entitled only to the third of the superplus, after deduction of the conquest during the first marriage. *Stair*, 25th January 1671, *Sandilands contra Sandilands*. *Stair*, 19th June 1678, *Dickson contra Young*. June 1729, *Stewart contra Hall*. --- A bond of provision delivered in *liege poustie*, like other debts, comes off the whole head of executry. *Stair*, 16th July 1678, *Murray contra Murrays*.

FOUND, That funeral-expences, aliment of the defunct's family till the next term after his decease, the expence of confirming his testament, and his relict's mournings, affect not only the dead's part, but come off the whole head of the executry ; all these being considered as the defunct's debts, but that the charges of building a monument to the defunct by warrant of his testamentary deed, must come off the dead's part only. *Forbes*, 20th June 1713, *Moncrief and her husband contra Monipenny*.

WHAT is reckoned executry, with relation to the children. See Heretable and Moveable.

WHAT with relation to the wife. See Husband and wife.

PARTITION of executry among wife, children, and dead's part. See Legitim.

EXERCITOR.

THE freighters of a ship having trusted the master with a sum of money, as a stock-purse, for buying goods at the port to which she was freighted, and the master having run away with the money, the owners also being hereupon pursued, not only *exercitoria actione*, but upon the edict *nauta, caupones, stabularii*, in regard that money used to be carried to that port as a *corpus* rather than a quantity ; the Lords, in regard the master's receipt carried not such a number of pieces, but a neat sum, with an obligation to be accountable at meeting, found, That his receipt did not bind the owners, since the freighters followed the master's faith, and it did not appear that he was *huic negotio præpositus* by the owners ; and therefore absolved the exercitors or owners. *Forbes*, 12th, Fountainhall, 16th December 1707, *Coltran contra Mathie*. --- Constituents found liable to pay money borrowed by their supercargo, tho' neither did his commission bear any express power to borrow money, nor was it applied to their behoof. 25th July 1732, *William Rogers merchant in Virginia contra Cathcart and Ker*.

EXHI-

EXHIBITION.

ONE deriving right to lands from an apparent heir, who died in the state of apparen-^{Who have interest to pursue exhibition?}cy, insisted in an exhibition of the title-deeds of the estate; objected, that he had no right to the lands, nor consequently to the title-deeds. The Lords found the pursuer had no title to demand exhibition of rights granted to the predecessors of his author, the apparent heir. 19th June 1734, Campbell *contra* Earl of Caithness. --- The Lords allowed inspection of the vassal's retours to the donatar of ward, to the end he might know what lands held ward. Gilmour, 7th, Stair, 20th December 1661, Earl Rothes *contra* tutors of Buccleugh. --- An incident was allowed in an impropation for production of many mens writs, which the pursuer had no other interest in, than to make a *comparatio literarum* with the writ challenged as forged. Haddington, 4th July 1623, Earl of Home *contra* Cranston. --- In an exhibition of a contract of marriage, to which the pursuer was not a party, found he behoved to condescend upon the particular clauses in the contract made in his favours. Hope, (*Exhibition*) 16th December 1626, Crawford *contra* Ld. Lammington. --- A wife and children of a marriage, insisting in an exhibition of all writs in the defender's hands, granted by the defunct husband, in prejudice of their contract of marriage; the Lords thought, tho' all methods are to be encouraged to detect and punish fraud, yet the same must be done in a regular way, without subverting our known forms; therefore found in this case of personal creditors not having affected the subject, that they could call for no writs but what were conceived in their own favours, or to their behoof. Fountainhall, 25th November 1707, Lady Kinaldy *contra* Paton.

No person can have action to compel a party to exhibit writs to found an action against himself, *quia nemo debet edere instrumenta contra se*.^{If one is bound edere instrumenta contra se?} Haddington, 10th February 1623, Monteith *contra* M'Math. --- In a process of compt and reckoning, betwixt the representatives of two brothers, the pursuer insisted, that the defender should produce his father's compt-book, in order to fix a charge against him, who excepted, *nemo tenetur edere instrumenta contra se ad fundandam litem*; and that the form of process was, for the pursuer to give in a particular charge; and litiſcontestation being made thereupon, he might crave exhibition of the compt-book, or other writings *per modum probationis*. Answered, The two brothers were in a copartnery, and besides, one brother was factor for the other, which gives the pursuers an interest to call for the compt-book as their proper evident; the Lords ordained the book to be put in the hands of the Lord Auditor; and if by inspection he found any copartnery, or factor accounts, he should produce the same to the pursuers, even *ad fundandam litem*, otherwise that the same should be given back and not shown. Stair, 7th July 1668, Paton *contra* Paton.

EXHIBITION at the instance of a bankrupt's creditors against his mother, is competent for exhibition of all writings belonging to him in her custody, tho' no particular writings be condescended on. Durie,^{General conclusion of all writs.}

25th February 1637, Hepburn *contra* Barclay. ---- In a reduction and improbation of certain land-rights, the defender produced charter and sasine, sufficient, with forty years possession, to exclude the pursuer; the pursuer took out a diligence in general to prove interruptions, and having executed the same against the defender himself, the Lords found, That he was not obliged to depone, unless a special condescendence were given of writs called for to be exhibited. 26th June 1735, Francis Scot *contra* Lord Napier; and they afterwards refused to oblige the defender to produce an inventory of his writings, particularly condescended on by the pursuer. 13th January 1736, *inter eosdem*.

Who liable
to exhibit?

IN an action of exhibition of evidents, the Lords found this exception relevant, *viz.* That before the charge, being a common evident, it was delivered to one of the colleagues. Hope, (*Exhibition*) 1st February 1620, Earl Murray *contra* Hay. ---- When the haver of writs is called by an incident diligence, it is not sufficient to libel and prove that he had the writs some time or other, but it is necessary to prove he had them since intenting the cause; and if it is only alledged he had them before, it is further necessary to prove, that he fraudulently put them away. Durie, 17th November 1627, Inglis *contra* Kirkwood. --- In an incident diligence against havers of writs, a party was only found obliged to depone, if he had any of the writs after citation, or if he fraudulently put away the same before citation, *quia pro possessore habetur qui dolo desit possidere*: But it was found, that he ought not to be examined upon his knowledge, in whose possession the same were. Stair, 14th November 1662, creditors of Bryson *contra* his son. ---- A party being pursued for exhibition and delivery of writs, it was not found sufficient that these writs were once in his possession; because writs pass from hand to hand, and it is not usual to take receipts for them; and therefore it was only found probable by the defender's oath what had become of the writs in question: And this, tho' it was instructed that he had granted receipt and obligation for redelivery to a third party; which it was found the pursuer could not build upon, having no right to that obligation, Stair, 31st January 1678, Tailzifer *contra* Gordon.

Exceptions
reserved a-
gainst delivery.

IN an exhibition, the Lords repelled an exception founded upon an assignation and intimation of the bond craved to be exhibited, and ordained it to be exhibited, reserving against the delivery. Hope, (*Exhibition*) 7th February 1622. ---- This again found, where the assignee was dead, but if he had been alive, the Lords declared they would have refused to bind him to exhibit. Hope, (*Exhibition*) Wishart *contra* Lees. --- In an exhibition of a bond, as belonging to the pursuer, the defence was repelled, that it was consigned in the defender's hand, as not being relevant against the exhibition. Haddington, 26th June 1623. --- The like. Auchinleck, (*Exhibition*) 21st February 1628, Howat *contra* Aitkin.

Spoliatus an-
te omnia resti-
tuendus.

A BOND being called for in an exhibition, as being unlawfully taken from the pursuer; it having been in his possession as his proper evident; the Lords refused to allow the defender to dispute its validity, but sustained the summons for redelivery, reserving to the defender his defences

defences against it when pursued. Haddington, 23d January 1610, Stewart *contra* Campbell.

Exhibition ad deliberandum.

AN apparent heir of conquest may pursue exhibition *ad deliberandum*. Colvil, December 1588, Pitcairn *contra* Murray. Competent to all sorts of heirs.
 --- Competent to an apparent heir of provision. Falconer, 25th February 1684, Scot *contra* Forrest. --- Competent to all kinds of heirs, male and of tailzie, as well as heirs of line. Forbes MS. 10th February 1714, Crawford *contra* Crawfords.

EXHIBITION *ad deliberandum*, may be pursued after the *annus deliberandi*. Durie, 1st July 1626, Nisbet *contra* Whitlaw. Competent after *annus deliberandi*.

AN apparent heir having made up titles by an adjudication upon her own bond; yet this was found not to take away her privilege of an exhibition *ad deliberandum*, for she refused that she had possess'd thereon; and it was pled for her, That, *esto* she had, it would infer no passive title; and as she might be forced by other creditors to purge the estate of that debt, it was reasonable she should have the privilege of deliberating, whether it was safe to enter heir. Stair, Gosford, 8th January 1675, Waird *contra* Waird. If behaviour bars this privilege?

GESTIO pro hærede, was found to be no bar against an apparent heir pursuing exhibition *ad deliberandum*. Bruce, 30th June 1715, Spark *contra* Barclay of Ury. Forbes MS. 10th February 1714, Crawford *contra* Crawford.

RENOUNCIATION to be heir in favours of one creditor, does not hinder the heir, afterwards resolving to enter, to pursue an exhibition *ad deliberandum* against another. Stair, 8th January 1675, Waird *contra* Waird. --- An adjudication being led *contra hæreditatem jacentem* upon the apparent heir's renunciation, it was argued, that the apparent heir afterwards resolving to enter, could not have exhibition *ad deliberandum* against the adjudger, because the renunciation was a virtual approbation of the adjudger's diligence. Answered, There is no presumption when one renounces, that he does it in any other view than to save himself from being liable; and when he afterwards proposes to enter, there is the same reason he have an exhibition *ad deliberandum* against the adjudger as against any other. The Lords refused the action *ad deliberandum* in this case. January 1721, Richardson *contra* Livingston. If renunciation bars it?

AN heir was found to have right to call for the writs of his predecessor's lands, tho' the predecessor had resigned the same for new infestment in favours of the defender; for seeing infestment was not expedient, the heir, who might still enter to the lands, must be indulged his ordinary privilege. Durie, 15th February 1632, Ayton *contra* Ayton. Has no interest to call for writs of lands whereof the defunct was denuded.
 --- The contrary. Marcus, (*Exhibition*) March 1683, Lady Yester

Yester *contra* Lord Lauderdale. ---- The writs of the predecessor's lands being called for in an exhibition, and the defender producing some expired comprisings for small sums, to show that the defunct was denuded, and it being alledged that they were satisfied by possession within the legal; the Lords ordained the defender *ante omnia* to exhibit the writs, reserving all defences against delivery. Gilmour, 12th January 1665, Steil *contra* Thomas. ---- The debtor against whom an apprising is led, having ratified the same by a deed under his hand, this was found sufficient to bar the debtor's apparent heir from pursuing an exhibition of the apprising *ad deliberandum*. Bruce MS. 11th July 1716, Rutherford *contra* Lockhart. ---- A tutor having renounced a wadset-right, in which his pupil was apparent heir, without waiting to be compelled by an order of redemption, exhibition was thereafter allowed to the apparent heir, of the wadset-right, and the pursuer's right to the wadset was not found so clearly sopite by the tutor's renunciation, as to bar her from her privilege of deliberating. Forbes, 19th June 1712, Dick *contra* Roriefon. ---- The Lords sustained this defence against an exhibition *ad deliberandum*, That the defunct had disposed the fee of the subject irredeemably, and so the pursuer had no interest, altho' he alledged it was done on death-bed, the reduction whereof was reserved to him. Fountainhall, 7th February 1680, Bruce *contra* Pettie and her husband. ---- An alledgeance founded on an expired comprising, against the brother of the pursuer, was found not sufficient to exclude an exhibition *ad deliberandum*, as apparent heir to his father and grandfather, and other predecessors; unless the comprising had been led against the brother as heir, or lawfully charged to enter heir to his predecessors. Home, January 1685, Lady Fintry and Lady Mary Scrimzeour *contra* Earl Lauderdale.

Who liable
to exhibit?

THE Lords found the defender not obliged to depone upon his knowledge, where papers called for were, or in whose hands they had been since the defunct's decease, but in the common terms of an exhibition, if the defender had or has, or fraudulently put away any papers since and before intenting of the cause. Home, Fountainhall, 3d December 1685, Lord and Lady Yester *contra* Earl Lauderdale.

What writs
may be called
for?

EXHIBITION found relevant of all writs granted to the defunct. Stair, 6th December 1661, Tailfer *contra* Sornebeg.

EXHIBITION sustained of all deeds granted by the defunct to whatever person, which were in his possession the time of his death. Stair, 29th November 1667, Pringle *contra* Pringle.

ACTION for exhibition *ad deliberandum*, sustained of all obligations made by the defunct to the defender a stranger. Durie, Spotswood, (*Exhibition*) 26th February 1633, Swinton *contra* Ld. Westnisbet. ---- Exhibition found relevant of all writs granted by the defunct to his wife, children, or other persons being in his family at the time of his death, upon which no infestment has followed; but refused to sustain it of writs granted to strangers. Gilmour, 19th November, Stair, 6th December 1661, Tailfer *contra* Sornebeg. Stair, 22d December 1675, Maxwell *contra* Maxwell. Fountainhall, Dalrymple, Forbes, 16th January 1706, Buchanan *contra* Marquis Montrose. ---- But thereafter the defenders, tho' strangers, were ordained to exhibit all writs.

writs in their hands granted to or by the pursuer's predecessors. Bruce, 30th June 1715, Spark *contra* Barclay of Ury.

EXHIBITION refused of writs whereupon infestment has past; for as to these, the records, it was thought, may give as much light as was sufficient to deliberate. Stair, 6th December 1661, Tailfer *contra* Sornebeg. ---- For the same reason it was found a good defence against exhibition, that the writs called for were registred in the session-books, the defender giving in a condescendence of the dates of registration. But the defence was not sustained as to writs recorded in the books of chancery, or in the books of inferior courts. Fountainhall, 23d December 1707, Pringles *contra* Johnston. ---- Thereafter found the defenders must exhibit all writs in their hands, whether infestment has followed or not. Bruce, 30th June 1715, Spark *contra* Barclay of Ury.

EXHIBITION is the proper conclusion of this process, but not delivery, which an heir cannot insist for, without being served. Durie, 1st July 1626, Nisbet *contra* Whitelaw. No conclusi-
on for delive-
ry,

FOUND, That an apparent heir may pursue an intrometter with his predecessor's estate to accompt; that upon a view how the balance stood, he might determine to enter heir or not. Durie, 16th March 1637, Home *contra* Blackader. ---- But thereafter, the Lords refused to sustain the summons for compt and reckoning, but only for exhibition; upon this ground, that no party should be troubled to compt where the action cannot produce an exoneration. Gosford, 7th December 1669, Hog *contra* Straiton. Stair, 22d June 1671, Leslies *contra* Jeffray. Nor for compt
and reckoning,

EXPENCES.

THE executor having followed out a process begun by the defunct, and at last succumbed, did afterwards, in a compt and reckoning with the legatars, state the expences of that process as an article of discharge to come off the whole head. The legatars contended, That there was free gear sufficient to answer all the debts and legacies; and as the executor himself was residuary legatar, the benefit of the process would have entirely accrued to him, and he only ought to bear the expences. Answered, It is the executor's duty to execute the testament, and to follow forth every probable ground of plea: The expences of administration is a debt that must come off the whole head, and no particular party's interest is considered in *re communi*, till the subject come to be divided. The Lords found, That the expences must be defray'd out of the executry, and come off the whole head; by which the expences of process and other acts of administration, land entirely upon the person who draws in the last place. Dirleton, 4th June 1674, Bogie *contra* executors of Lady Oxenford. See Gosford, 5th, Stair, 6th June 1674, Law *contra* executors of Lady Oxenford, Expences
laid out in *re*
communi.

who observe this decision as if this process had been found to be entirely upon the risque of the executors.

THE donatary to a gift of bastardy being pursued by the bastard's creditors, got allowance of all expences bestowed for the gift, and in pursuing of debtors. Gosford, 20th November 1674, Somervel *contra* Sharp.

EXECUTOR-CREDITOR computing with other creditors for his intromissions, the expences of confirmation may be deduced by him out of the whole head, in terms of the act of sederunt, 28th February 1662. Fountainhall, 2d January 1708, Ramsay *contra* Nairne.

THE expences of ranking and sale found to come off the whole head *tanquam præcipuum*, and that the preferable creditors should suffer no defalcation, tho' the practice had been otherwise. Fountainhall, Dalrymple, 16th January 1702, creditors of Pitencrief competing. --- See act of sederunt, 23d November 1711, § *ult.* where it is appointed, that the expences of ranking and sale must be proportioned amongst the creditors according to the shares they draw of the price. And it being questioned with regard to a bond of provision, ranked *ultimo loco*, as being reducible upon act 1621, whether the child could draw any part, until the preferable creditors were fully paid up? it was found, That the act of sederunt is equally applicable to all sorts of creditors. Home, 25th July 1718, creditors of Auchinvole *contra* the daughters. --- Upon a bankrupt estate there were three classes of creditors: 1^{mo}, The preferable creditors, who were instantly to draw their whole debts out of the price. 2^{do}, The creditors in annuities for life, who were to draw yearly the annualrents of a part of the price, left for that end in the purchaser's hands. 3^{tio}, The other creditors, who, upon termination of the liferents, were to draw the principal sum. It was contended with regard to the expences of the ranking and sale, That the method of proportioning the same, founded in the act of sederunt, and followed in practice, is, that the whole expence be paid by the purchaser in the first place, a proportion whereof to be detained from the preferable creditors drawing their payments; and as to the remainder, the interest to be deduced yearly from the liferenters, and the principal from the creditors when the liferents run out. Notwithstanding of which, the Lords ordained the expences of the ranking and sale to be proportioned on the haill creditors, who are now, and at the event of the liferenter's death, to draw the price, and that a deduction be made accordingly. And further, in regard there could be no retention till that time off the creditors, who only draw their payment at the death of the liferenters, therefore ordained the proportional expence which falls to their share, *pro loco & tempore*, to be also further proportioned on these creditors who now draw payment; and ordained the same to be retained accordingly: And ordained the purchaser to repay them the said sums, without annualrent, at the first term of Whitsunday or Martinmas, after the death of the liferenters, and to detain the same from the creditors intitled to draw the price liferented. July 1727, creditors of Abotshall competing.

IN a sale carried on by an apparent heir, if there be no reversion, the expence must be proportioned among the creditors in terms of the act of sederunt 1711, being in that case *in rem versum* of the creditors, and not of the heir. 3d February 1738, Nicolson *contra* his father's creditors.

THE

THE Lords refused a tenant his expences in suspending on multiple-^{Expences laid out in obtaining exoneration.} poinding against his master's creditors; but reserved him action or retention against the master himself in the following years tack-duty. Fountainhall, 19th June 1703, Anderson *contra* Gordon and his creditors. ---- A debtor suspending upon double distress, is intitled to retain his expences out of the subject; but, in the present case, the debtor having betrayed some anxiety to stave off the creditors, he was refused expences *in pœnam* of litigiousity. Fountainhall, 20th June 1707, Kier *contra* creditors of Earl Winton. ---- A Lord's factor is intitled to his expences of plea in fitting accompts, and obtaining decreet of exoneration. Home, February 1687, Smith *contra* creditors of Innergellie.

A MAN having uplifted a sum for another who intrusted him to do so, and being pursued, first denying the trust, and that being made out^{Expences of plea.} by witnesses and other pregnant evidences; next founding on a general discharge, and it being referred to his oath, that this debt was neither *actum* nor *tractatum* to be comprehended; and he, after much shifting and tergiversing, at last compearing and deponing, That it was communed upon and included, and thereupon being affoizied; the Lords, notwithstanding, found him liable in the pursuer's expences. Fountainhall, 22d February 1701, Smith *contra* Hamilton.

F A C T O R.

A KIRKMAN having granted a factory for the factor's life, to^{Factory when irrevocable?} uplift some bolls of victual, with a certain number of them to himself for his pains; the Lords found, That the kirkman setting afterwards the said bolls in tack, did not prejudice the factor of his salary, because such a factory, *ubi merces intervenit*, approaches nearer to the nature of *locatio* than *mandatum*. Colvil, February 1581, Stewart *contra* commendator of Paisly. ---- A debtor having granted assignation of mails and duties to one of his creditors, for payment of several debts due to the assigney and others, bearing to endure for thirteen years, and ay and while these debts should be paid, with allowance of *L. 5 Sterling* of yearly salary; after the debtor's death his heirs withdrew the salary, and it was found, That the factory was revocable by the granter, and fell by his death, seeing the factory was not fixed for years, as the assignation was. Bruce, 17th December 1714, Drummonds *contra* Sinclair.

A FACTORY granted by a minor with consent of his curators, in-^{When under- stood revoked?} definitely, does not fall at majority, but continues until it be *de facto* recalled. Durie, 12th November 1624, Nasmith *contra* Nasmith.

A WIFE who had a general factory, with a special clause, im-^{Factor's powers.} powering her to do every thing the husband himself might do, &c. disposing some goods to another person, and owning him to be creditor to her husband; the Lords nevertheless found the disposition null, unless

the disponee could qualify how the husband was his debtor ; in respect the wife's factory, tho' it might be interpreted in the most extensive shape as to acts of administration, could not carry a power gratuitously to alienate. Durie, 13th June 1628, Purves *contra* Smith. --- A factor being ordered to cause make a cistren of L. 500 sterling value, and he giving up L. 573, which was *ultra fines mandati* ; yet the Lords allowed this article, because 'tis scarce possible for a craftsman to frame a piece of work exactly to the weight bespoke. Fountainhall, 1st July 1712, Dutcheffs of Buccleugh *contra* Sir David Nairne. --- The Lords refused to allow a factor put upon an estate by themselves, to remove tenants who had taken tacks from him for a year, and obliged themselves, by a clause in the tack, to remove without warning, they having punctually paid their rent, and offered more rent than was to have been paid by the persons he would have put in their room, and being abundantly solvent. Forbes MS. 22d July 1714, Edgar *contra* Whitehead.

Act of federunt, 1711.

A FACTOR appointed by the Lords upon an estate, not bankrupt, but only sequestered, till the claims of two pretenders to the property were discussed ; is, nevertheless, bound to observe the regulations set down in the act of federunt, 22d November 1711 ; and the factor contraveining the same, was, by their Lordships, removed, altho' the act only refers to factors on bankrupt estates. Bruce MS. 6th July 1716, Home *contra* Robertson.

Factor entitled to a salary.

FACTOR who had no written factory, found entitled to a salary, tho' none was pactioned. Fountainhall, 1st July 1712, Dutcheffs Buccleugh *contra* Nairne. The like. Bruce, 8th February 1715, children of Smith *contra* Earl of Winton.

Factor malversing.

THE Lords refused to allow any factor-fee to the factor on a bankrupt estate ; because he had been negligent, and had given up in his accompts some articles as rests which had been paid to him ; since to allow him a salary, would encourage factors to endeavour to wrong their constituents. Forbes, 22d June 1711, Heriot *contra* Ker.

At what period chargeable with the price of victual sold ?

IN a compt and reckoning, the price of the victual intromitted with by one of the parties, being decerned to bear interest ; the next question was, At what period the price must be presumed to have been received, in order to fix a commencement for annualrent ? It was urged, That it ought to be considered as received at Candlemas, seeing the party was indulged the ease of the Candlemas fiars. The Lords found he could not be stated as debtor for the price sooner than Whitsunday, victual not being ordinarily sold for ready money. Fountainhall, 16th June 1697, Bruce *contra* Kiery.

Factor contracting *factorio nomine*, is he personally liable ?

ONE who contracts *factorio nomine*, is presumed to bind his constituent only, unless the contrary be expressed ; and therefore is not personally liable to implement, but only to furnish a sufficient commission so as to bind his constituent. 17th February 1738, Rankin *contra* Mollison.

WHO

WHO runs the hazard of accidents, the factor or constituent? See Periculum.

DILIGENCE of factors. See Diligence.

FACTOR may assign a debt due to him by his constituent, ante redditas rationes. See Compensation. Retention. See Payment.

FIARS of the year, if the rule for compting. See Fiars.

LIABLE for annualrent. See Annualrent.

WHO names the factor upon a bankrupt estate sequestred? See Sequestration.

INTITLED to his expences. See Expences.

BOUND to communicate eases. See Pactum illicitum.

FACULTY.

A HUSBAND disponed his land-estate to his wife in liferent, and to any of his blood relations she should think most fit to be nominate, by a writ under her hand, in fee. ^{Faculties that are consistent in law.} A nomination was accordingly made after the husband's decease; and against the nominee claiming right to the estate, it was argued, 1^{mo}, That this was an unhabile way of transferring property; because a fiar cannot be created by the nomination of one who is no fiar. 2^{do}, It is contrary to the maxim, that a fee cannot be *in pendente*; and yet here is a fee conveyed, a property established, but no proprietar until the wife chuse to exerce her faculty. Answered to the *first*, There is nothing in reason, or in law, to bar a fiar to name his successor in what shape he pleases; it is not material who names, but whether the nomination be by the authority of the fiar: And this is not more extraordinary than for one to give a mandate to sell his estate. To the *second*, The property is not transferred, until the wife interpose her nomination: In the interim the property remains with the disponer, and after his death is in *hereditate jacente*. The Lords found, That this disposition, granted by the husband to his wife, did sufficiently enable her to nominate persons to succeed to the subjects disponed; and that, she having accordingly exercised that power, the persons named by her have right to succeed. 28th November 1729, Murray *contra* Fleeming and others.---Collonel Campbell being bound in his contract of marriage, to secure the sum of 40000 merks, and the conquest during the marriage, to himself and spouse in conjunct-fee and liferent, and to the children to be procreate of the marriage in fee, did, by a death-bed-deed, settle all upon his eldest son, burdened with certain provisions to his younger children, to take place in case their mother should give up her claim to the liferent of the conquest, and restrict

herself to a lesser jointure, otherwise, these provisions to be void ; in which event it was left upon the duke of Argyle and the Earl of Ilay, to name such provisions to the children as they should see convenient. It being objected by the younger children, upon the mother's refusal to restrict herself, That their father could not delegate his powers, and that such delegation was ineffectual, there being no compulsiture upon the referees to determine, which brings the matter to the same as if the children were left entirely unprovided ; and concluding from this, that the settlement should be voided *in totum*, and that each child should have an equal proportion as if no settlement had been made ; the Lords found the power and faculty, given to the Duke of Argyle and Earl of Ilay, is lawful, and does subsist : And in respect these referees have neither exercised their power, nor declared their will not to exercise the same ; they superseded further proceeding in the cause till the fifth of June next, that in the mean time, either party might make proper application to the Duke of Argyle and Earl of Ilay, to determine what sums should be paid to the younger children, or declare their non-acceptance of the power committed to them. 16th December 1738, Campbells *contra* Campbells.

Import of
clauses contain-
ing reserved
faculties.

ONE having resigned his estate in favours of his second son, and his heirs-male, with a clause of redemption in favours of his eldest son, and the heirs-male of his body, reserving always his own liferent, and a power or faculty *to dispoise and contract debt, in the same manner as if the right had not been granted*, did, thereafter, limit the said power of redemption, provided in favours of his eldest son, so that it should not be exercised, unless with the consent of certain persons named ; it was objected, That the reserved faculty impowered the father to sell or contract debt, and do all acts of property beneficial or profitable to him, but not to do mere gratuitous or arbitrary deeds, such as to limit or discharge his son's right of redemption. The Lords found the father had full power to alter the succession, or discharge the right of redemption. Fountainhall, Forbes, 2d January 1706, Dundas *contra* Dundas.--- A woman having first made a disposition of her whole estate to her nephew, with a power reserved to alter, in case of urgent and absolute necessity ; and thereafter making a second disposition to another nephew, on a narrative, That the first had disobliged her, &c. tho' it was not alledged that she was in any necessity ; the Lords in a reduction of this second, at the instance of the first, found the said first disposition revocable, and revoked by the second ; and therefore reduced it, and preferred the second. Fountainhall, 4th July 1712, Renny and Robison *contra* Miller.

Faculty
when under-
stood exercised,
so as to be ef-
fectual against
the dispoise.

AN heiress having infeft her son upon resignation, reserving to herself a faculty, to dispoise a yearly annualrent out of the lands to her daughters ; and having accordingly executed a charter to that effect, containing a precept of sasine, but not having delivered the same to her daughters, or infeft them ; in a process at their instance, after their mother's decease, against their brother, to give a precept for infefting them ; it was objected, That the charter was an uncompleted deed, and the faculty not exercised ; the Lords found the subscribing the charter was sufficient, containing precept, whereby she was in effect denuded. Durie, *penult.* June 1624, Hamilton of Silvertonhill *contra*

tra his sisters. ----- A father, for love and favour, having disposed his whole estate to his eldest son, reserving a power to burden the same with wadsets or annualrents, to any person not exceeding a sum named; and having thereafter granted a personal bond of provision, but without any relation to the faculty; in a pursuit upon the bond, against the disponent's representatives, it was objected, *1mo*, The father had no power to burden the estate, otherwise than by granting wadsets or annualrent-rights. *2do*, No presumption that he intended to burden it, seeing at the time he had an opulent executry. Answered to the *first*, The reserved faculty must be interpreted *benigne*, where the disposition was gratuitous, and the words *wadsets or annualrents* are not taxative. To the *second*, The presumption must be, that the granter design'd that his daughter's provision should be secured in the most ample manner. The Lords presum'd the father's will to be, that the bond should burden his executors in the first place, and the son's estate in the second place. Stair, Dirleton, 21st June 1677, Hopepringle *contra* Hopepringle. ---- A father having dispon'd lands to his children of the second marriage, reserving a faculty to contract debt and *grant securities therefore*, did contract some personal debt, for which adjudications were led against the lands after the debtor's death. It being questioned, *1mo*, Whether the simple contracting of personal debt was a sufficient exertion of the faculty, without granting real security therefore? *2do*, Whether adjudications for these debts could be led after the debtor's death, when his faculty was extinguished with him, and the lands not in his *hereditas jacens*? The Lords found, That the granting personal bonds was an exercise of the faculty; and that even after the death of the granter adjudications might be led by the creditors in the bonds against the children of the second marriage of subjects disposed to them with the reserved faculty. 17th January 1723, competition betwixt the creditors of Rusco and Blair of Senwick. ---- A party marrying an heiress, in the contract the estate was provided to heirs-male, with power to burden the estate with a certain sum in favour of the heirs of a second marriage; thereafter the man marrying, and in the contract binding for a sum, and obliging his heirs for the same, in a process at the instance of the relict and son of the second marriage against the heir of the first, the Lords found the above faculty sufficiently exercised by his entering into the second contract, and providing *ut supra*; but found, that the faculty must only burden the defender *ultimo loco*, his other estate falling short. Fountainhall, Dalrymple, 23d June 1698, Carnegie *contra* Ld. Kinfauns. ---- A father having disposed his estate to his eldest son in his contract of marriage, reserving to himself a power to burden the estate with a certain sum for provisions to his younger children; this very clause was found to produce action to the younger children against their brother, tho' the father died without exercising the faculty. Gosford, 15th February 1673, Graham *contra* Ld. Morpie.

IN a question, How far a reserved faculty by a father in his son's right of fee, allowing the father to burden the lands with a sum, accresced to a creditor whose debt was contracted before that faculty? The Lords were generally clear, in the first place, That if it had been a debt subsequent to that reserved faculty or power, the contracting thereof was a presumptive exertion of the faculty, tho' not ex-

Reserved faculty, if it operates in favour of prior creditors?

pressly mentioned to be in virtue thereof; but the difficulty was with regard to an anterior creditor, that he could not lend his money on the faith of the faculty which was not in being: Yet their Lordships thought it reasonable to subject these faculties to all debts whether prior or posterior; and therefore found the faculty accresced to the anterior creditor. Fountainhall, Dalrymple, 16th December 1698, Eliot of Swynside *contra* Eliot of Meikledean.

Disposition to an heir with a power to alter, &c. makes him liable to the disponent's debts as heir of provision.

A FATHER disponing to his sons of the second marriage several parcels of lands, *reserving to himself full power and faculty to alter and innovate, and to contract debt, &c. as fully and freely as if the entire fee were in his person.* The question occur'd, If these disponents were liable to the personal debts of their father, contracted before the existence of the faculty to burden? The sons pled, That they were singular successors, and that after their dispositions their father retain'd sufficient fund for the payment of all his debt; so that they could neither be liable as heirs, nor upon act 1621: And as to the faculty to burden, whatever benefit that might afford the debts contracted after the existence of the faculty, which might be interpreted as an exercise thereof, anterior creditors cannot plead upon it. It was answered, That the defenders, according to the form of their rights, are indeed singular successors; yet, from the nature of them, are liable equally, as if, in the strictest sense, they were heirs of provision: For when a father disposes to his children with such reserved faculties, he is not understood to have any other intention, but to save the trouble and expence of a service; the disponents, by acceptance, are understood to have subjected themselves personally to all the disponent's debts, so far as subjects disponed do reach; and therefore, in the eye of law, are to all intents and purposes considered as if they were heirs of provision. The Lords found the children of the second marriage liable as heirs of provision. 21st July 1724, creditors of Rusco *contra* Blair of Senwick. --- In such a case, where the disposition was to the apparent heir, it was contended for the creditors, that the son was universally liable as if he had entered heir; but this was not sustained, and the disponent found liable *in valorem* only. Bruce MS. 17th, Dalrymple, 18th January 1717, Abercromby *contra* Graham.

Faculty when understood exercised, so as to be good against singular successors.

A FATHER having reserved a faculty to burden the estate with wadsets, or infeftments of annualrent, to the extent of a certain sum, and having granted a personal bond, referring expressly to the faculty; this was not found a real burden, nor effectual against a singular successor, *sciz.* a donatar of forfeitry. Gosford, 11th, Stair, 12th July 1671, Learmont *contra* Earl Lauderdale. --- One having disponed his estate to his eldest son, reserving a faculty *to affect or burden the same with a certain sum for provisions to his children*, the son's creditors did diligence against the estate, and were infeft upon their apprisings; thereafter the father exercised this faculty in favours of the children, by granting them heritable bonds referring to the faculty, upon which they were also infeft: In a competition, the Lords preferred the children in virtue of the above faculty, tho' the creditors infeftments were prior. Stair, Dirleton, 6th January 1677, creditors of Moufswell *contra* children. Stair, 16th December 1679, children of Moufswell *contra* creditors. --- One having purchased an estate, took the same to himself

himself in liferent, and to his son *nominatim* in fee, with power to himself to dispone, wadset, &c. thereafter he granted a personal bond, without relation to the faculty; upon which the creditor adjudged the estate, not only after the death of the father his debtor, but after the son was denuded, and a purchaser from him infest. The Lords found, That the father was in effect fiar, and that the son, in effect heir, would be liable to the father's debts *in valorem* of the subject, and therefore that creditors had access to adjudge the estate, while remaining with the son or his heirs; but found, that granting the bond in question was no exertion of the faculty, and therefore that it cannot affect singular successors. Home, February 1719, Rome *contra* creditors of Graham. --- The like. November 1725, Sinclair *contra* Sinclair of Barack, --- One disposed his estate to his eldest son, reserving to himself a faculty to burden the same with 5000 Merks, in favours of whatever person he pleased; thereafter he granted personal bonds for that sum to his wife and children, referring to the faculty. After his decease, a competition arising betwixt the creditors in these personal bonds, and the son's real creditors infest in the estate, the Lords found the bonds granted in pursuance of the faculty are only personal, so as to affect the heir; but not real burdens affecting the land. 26th June 1735, Ogilvies *contra* Turnbull.

ONE having acquired an estate, and taken the same to himself in liferent, and to his son *nominatim* in fee, with a faculty to burden, *contract debt, and to sell or otherwise dispose at his pleasure*, did first grant a personal bond, declaring it to be a burden upon the fee, thereafter sold the estate. In a competition betwixt the creditor in the personal bond, and the purchaser infest, the Lords found, the bond was no real burden upon the estate, and preferred the purchaser. Forbes, 16th December 1708, Davidson *contra* town of Aberdeen.

Competition of creditors claiming under the faculty.

IN a disposition to an eldest son, the father having reserved a faculty to burden the disponee with the sum of 4000 Merks in favours of a younger son, to be paid at the first term after the father's decease, or the younger son's marriage, did, many years after this younger son was married, exercise the faculty in his favours, by granting him a bond of provision, obliging his eldest son to pay the said 4000 Merks, with interest *retro* from the said marriage. The eldest son objected to the clause of annualrent, and insisted, That there was no debt till the same was created by the father's exercising his faculty, consequently no annualrent *retro*, which would be *accidens sine subjecto*. The Lords found no annualrent, but from the date of the deed in exercise of the faculty. 2d January 1739, Anderson *contra* Anderson.

Reserved faculties stricti juris.

FAIRS and MERCATS.

A PERSON being infest with the privilege of a fair, time out of mind, and a neighbour within a mile impetrating thereafter an infestment with the like privilege, and then making his fair to end only

Gift of a fair obtained by obreption.

the day before the other used to begin; the Lords ordained the privilege of the latter to cease, as impetrate *in emulationem vicini*; and found, that the said fair could only be kept at any time after the end of the first heritor's fair, or at any time before it, only allowing a month to intervene betwixt them. Durie, 24th June 1642, Falconer *contra* Ld. Glenbervie. ---- A gift of a fair was found void, as obtained by obreption or subreption, being upon the same day with a fair in the neighbourhood, which it was presumed the king would not have granted, had he known the truth. Stair, 24th December 1679, Farquharson *contra* Earl of Aboyn. ---- A royal burgh having obtained a charter from the king, containing sole right of fairs and mercats within two miles of that burgh, exclusive of all others; whereupon they soon thereafter obtained decret of declarator in absence against a neighbouring heritor, who notwithstanding, several years thereafter, procured a right from the parliament to hold two yearly fairs. Against which the burgh having then protested, and now raising a new declarator against him, that he had no right to hold a fair within these bounds; the Lords found the king denuded by the prior gift to the town, which had such a *jus quæsitum* thereby, that the heritor, notwithstanding the act of parliament in his favour, could hold no fairs within the said bounds. Fountainhall, 7th February 1706, town of Stirling *contra* Murray.

Stollen goods
bought in publick
mercato.

IN case of stollen goods, the exception, of bought in a publick mercat was repelled; and the party allowed to pursue the buyer for repetition, but not for any personal punishment; and this altho' the thief was executed. Auchinleck, (*Buying and Selling*) 2d July 1629, Bishop of Caithness *contra* fleshers of Edinburgh. ---- A person buying a horse, tho' in a publick mercat, is liable in restitution to the owner, and is to rest for his recourse against the seller upon burgh and hamehold. Durie, 19th March 1639, Fergusson *contra* Forrest.

Breaking of
arrestment in
time of fair.

BREAKING of an arrestment in time of fairs found culpable. Maitland, 16th November 1552, Gibson *contra* Thomas Ker an Englishman.

FALSA DEMONSTRATIO.

A PARTY being assigned to L. 1000, owing to the cedent *per* bond by a person of quality still alive; which bond the assignation bore to be granted in the year 1606; it was found, That the party had right to the L. 1000 granted by that nobleman to the same person in the year 1696; seeing another L. 1000 bond *inter eosdem* in the year 1606 could not be condescended on, and neither of the parties was then born. Forbes, 16th February 1711, Dickson and Heriot *contra* Logan. ---- One having disposed with warrandice from his own fact and deed only, and particularly against an infestment in favours of one Janet Miller, proceeding upon a bond granted by a former heritor. In a question thereafter betwixt the parties, Whether the warrandice

randice was incurred? seeing there was no such infestment as the one described, but there was another in favours of one Jean Webster, proceeding upon a contract of marriage, the Lords found, That this was not *falsa demonstratio*, and that the warrandice was not incurred. Bruce, 2d February 1715, Ogilvie *contra* Leslie.

FERRY-BOAT.

WHERE a party has right to a ferry-boat, established by grant or prescription, it is not in the power of others, who may have a right of fishing upon the same part of the water, to interfere with the proprietor of the ferry-boat, by carrying over passengers for hire. Upon this footing the Lords found, That the other heritors might transport themselves and families, or others gratuitously in their coble-boats, but not for hire. And in this, ferry-boats are upon the same footing with fairs; both of them imply an exclusive privilege, otherwise they could not be kept up. 22d December 1731, Tarbat *contra* Bogle.

F E U.

FEU-rights granted before the act 1606, were valid, without consent of the superior, so as to exclude ward, recognition, &c. Stair, 24th June 1668, Stewart of Torrence *contra* feuars of Ernock. — Feus before parl. 1606, secure against casualties of superiority. The like, unless the pursuer could alledge, That the feu-duty was with diminution of the new retoured duty. Stair, 5th January 1681, Ld. Dun *contra* Viscount Arbuthnot. — Feus granted by vassals of wardlands so long as the act of parliament 1457, cap. 71, stood, did exclude not only ward and recognition, but forfeiture of the ward-vassal, granter thereof, without necessity of confirmation. Stair, 12th February 1674, Marquis of Huntly *contra* Ld. Cairnborrow. Stair, Fountainhall, 16th November 1680, Campbell *contra* Ld. of Auchinbreck and Earl Argyle. Marcus, (*Forfeiture*) January 1684, Campbell *contra* vassals.

SEEING the act 1606, does only annul feus set by vassals, holding ward of subjects without their superior's consent, it was found, That the superior consenting to such a feu, the subvassal was only liable for his stipulated feu-duties; and that the ward and marriage of the vassal did only affect the vassal's interest, viz. the feu-duty. Gosford, 28th June, Stair, 1st July, 1672, Earl Eglington *contra* Ld. of Greenock. Feu after 1606, with superiors consent, how far available?

Act 1606,
how far ex-
tended?

FOUND, That ward-lands of the principality could not be disposed feu, after the act 12th, parl. 1606, Hope, (*Ward*) Durie, 7th July 1629, Lady Cathcart *contra* vassals. See act 16th, parl. 1633, where the contrary is understood.

Feu granted
by the king's
vassal, upon
act 58th, parl.
1641.

A FEU granted by a king's vassal, upon the authority of the 58th act parl. 1641, was not found sufficient to defend against the ward and marriage of the superior, falling due after the rescissory act 1661, Cap. 15th, notwithstanding of the *salvo* at the end of the rescissory act, of all rights and securities in favours of private parties, seeing the same was not confirmed, which ought to have been done. Fountainhall, 27th February 1696, Lord Philiphaugh *contra* Eliot of Stobbs.

FEU-DUTIES.

Feu-duty in
victual, who
bound to carry
the same?

A FEU-DUTY being payable in victual; in a question, Who should carry the same? the Lords found, That where the superior dwelt, without the barony, the vassal was not bound to go and seek him *extra curtem domini*, (as the feudists speak). but if he lived *intra baroniam*, then the feuar was bound to bring it to the the superior. Fountainhall, 25th February 1696, treasurer of Edinburgh *contra* Feuars.

Feu-duty
payable in
bear, if barley
can be exacted?

LANDS being feued, for a feu-duty payable in bear, at a time when no barley grew in Scotland; and the feuar having been in use, past memory of man, to pay a converted duty in silver; and now the feuar being in use to sow barley only, which the superior insisted for, being entitled to demand the *ipsa corpora*; the Lords found, That such feus being perpetual locations, for meliorating and improving the ground, the superior had right to such grain, as by the vassal's industry grew thereon. Fountainhall, 25th February 1696, treasurer of Edinburgh *contra* Feuars.

Personal
action for pay-
ment of feu-
duties.

A PERSONAL action is competent to the superior, for payment of his feu-duty, not only against the original-feuar and his representatives, personally bound by subscribing the feu-contract, but also against singular successors purchasing from them; because the property is truly reserved, in so far as relates to the superior's casualties; and therefore all intrometters must be liable to the extent of the feu-duties. Durie, Spotiswood, (*Feus*) 21st July 1630, Moncrief *contra* Lady Balnagown. Durie, 24th February 1632, Bishop of Galloway *contra* his vassals.--- Yet it was found, That a tenant being removed before intending the process, is not liable to a personal action at the superior's instance, for payment of the feu-duty. July 1738, Biggar *contra* Scot.--- But as the rent of the land does belong to the superior, to the extent of the feu-duty only, he cannot insist against any intrometter, further than for the feu-duties arising during the years of his intromission; the remaining rents of any year, over and above the feu-duty, belonging, not to the superior, but to his vassal. Durie, 26th March 1629, Rollo *contra* Murray. Durie, *penult.* January 1639, Cockburn *contra* Trotters. Stair,

Stair, 19th July 1665; Winram *contra* Lady Idington. Fountainhall, Forbes, 7th February 1712, Hamilton *contra* Lord Burleigh. --- But bygone feu-duties may be followed out by poinding of the ground against all singular successors. Durie, 26th March 1629, Rollo *contra* Murray.

THE vassal by accepting of a feu-charter, containing the clause *reddendo inde annuatim*, becomes thereby liable personally for the feu-duties, whether the charter is granted to him originally, or if he is a purchaser from the original vassal; and therefore a feu-vassal was found personally liable for the feu-duties, even after he had sold his land, and the purchaser in possession, by a minute of sale, but without getting a charter from the superior. 29th June 1739, Wallace *contra* Ferguson of Auchinblain.

F I A R.

In questions betwixt the husband and wife, who understood fiar?

A TACK being set to a man and his wife, and longest liver of them two, their heirs or assignies; the Lords found, That the wife, after the husband's decease, cannot assign the same, except for her own lifetime; and if she decease before the ish of the tack, that the years yet to run pertain to her husband's heirs, notwithstanding any assignation made by her. Balfour, (*Locatio*) Maitland, *penult.* July 1562, Rig *contra* . --- A bond for a sum payable to the husband and wife, and longest liver of them two, with an obligation to infeit them and their heirs in an annualrent; and there having been no heirs of that marriage; the Lords found, That the whole annualrent, after the decease of the husband and wife, did pertain only to his, not to her heirs. Haddington, 10th November 1609, Ayton *contra* Jamison. --- Found, That an assignation of a reversion being made to a man and his wife, and their heirs, it behoved *in dubio* to belong to the man's heirs, and not to the wife's. Hope, (*Husband*) Collinson *contra* Ld. Pitfodels. --- A bond being granted to a man and his wife, and their heirs; after the man's decease without children, the Lords found the wife's heirs could claim no part of the same, and that the whole sum, after her decease, would belong to the husband's heirs; except the bond had born expressly, That failing heirs betwixt them, the sum should be divided betwixt the husband's heirs, and those of the wife. Auchinleck, (*Air*) 9th December 1630, White *contra* Bickertoun. --- A bond being granted to a husband and his wife, and the heirs of the marriage, which, failing their heirs, was found to pertain to the husband, after the wife's decease, *in solidum*; and that these words, *their heirs*, ought to be understood *civiliter* of the heirs of the husband, as being *persona dignior*. Dirleton, Stair, 19th June 1667, Johnston *contra* Cunningham. --- A party, for love and favour to his daughter, and other onerous causes, having assigned to her and her husband, their heirs and executors, a certain sum owing to him by a third party; the

Right taken
to man and
wife, and their
heirs.

Lords found, That the husband had right to the fee, and the wife to the liferent of the whole. Forbes, 23d July 1713, Edgar *contra* Sinclair. --- A wife during her marriage, having succeeded to some tenements and lands, did gratuitously dispoſe them *to herſelf and husband in conjunct-fee, and to the heirs and bairns of the marriage ; which failing, to the husband's other heirs and assignies whatſoever.* Notwithstanding this was a diſpoſition without any onerous cauſe, the Lords found the fee in the husband. June 1727, competition Edgar *contra* Edgars.

--- A bond bearing the ſum of 1000 merks to be received from the husband and wife, obliging the debtor " to repay the ſame to the " husband and wife, and longeſt liver of them two, their heirs executors or assignies. " The marriage having diſſolved, by the predecease of the husband, without children, the queſtion occurred betwixt the relict and the husband's children of another marriage, Which of them was fiar ? Pleaded for the children, That the husband was undoubtedly fiar, and *in dubio*, the fiar's heirs muſt be underſtood to be called. Answered, *1mo*, *Eſto* the husband had been fiar, the wife ſucceeded upon her ſurvivance, and then her heirs are underſtood to be called, as being the heirs of the fiar. *2do*, The meaning of the claufe is the ſame as if the bond had bore, *And to the heirs of the longeſt liver.* The Lords preferred the relict, and found, That the bond belonged to her as longeſt liver. 22d June 1739, Ferguſon *contra* Jean M'George.

Where the
right flows
from the wife.

A REVERSION being granted to a husband and wife, and their heirs, the wife having been fiar of the lands wadſet, was found alſo to be fiar of the reversion. Haddington, 18th December 1611, Ld. Kinnaird *contra* Ld. Pitfodells. --- A ſum being payable to a woman and her husband, and he long ſurviving her, and then deceaſing ; the Lords ſuſtained action at the inſtance of the wife's executors, but ordained, That execution ſhould paſs, at their inſtance, only for the half of the ſum. Durie, 11th March 1623, Dougal *contra* Henderſon. --- A wife diſpoſing all her goods, gear, and ſums of money to her husband, to be bruiked by him and her during their lifetimes, and after their deſcease to their heirs, executors and assignies ; there being no children alive at the diſſolution of the marriage, the husband was found to have the liferent of the whole, and property only of the half, the ſubjects being diſpoſed in general : But an heretable right ſo provided, would not have imported diſviſion, but have belonged to the husband and his heirs, as *perſonæ digniores.* Durie, 2d February 1632, Bartilmo *contra* Haſſington. --- An heiress having contracted her eſtate in her marriage-articles, diſpoſing the ſame to her husband in liferent, and the heirs of the marriage in fee ; which failing, to his heirs and assignies, reſerving her liferent. In a queſtion betwixt the husband's creditors and the wife's representatives, the husband was found fiar ; this dubious claufe being explained by ſubſequent claufes, the obligation to infeſt and procuratory of reſignation being conceived in favours of the husband and wife in conjunct-fee and liferent, and to the heirs of the marriage, which failing, to the husband's heirs and assignies ; and the claufe of warrandice obliged her to warrant the lands diſpoſed in favours of the husband and his foreſaids. Dalrymple, Forbes, 21ſt November 1705, creditors of Earnſlaw *contra* Douglafs.

INFEETMENT being taken to a man and his wife in conjunct-fee, and to the heirs betwixt them; which failing, to the heirs of his own body; which failing, to the wife and her heirs whatsoever; the Lords found, That the heretable right was not ruled by the last termination, but that it belonged to the heir of the first fiar. Hope, (*Feus*) 24th July 1622, Ramsay *contra* Maxwell. ---- The sum in a contract of marriage, given in tocher by the wife's father, being ordained to be paid to the husband and wife in conjunct-fee, and to the heirs betwixt them heretably; and, failing of heirs betwixt them, to the wife's heirs; and there being heirs of the marriage, and a creditor of the husband (all being still on life) offering to lead a comprising of the sum; the Lords found, That the property pertained to the husband, and that he had the full power and right to dispose thereupon at his pleasure; with reservation only of the liferent thereof to his wife; and consequently that the husband's creditor, who had comprised, had full right thereto, he always finding caution to make the same forthcoming to the wife for her liferent, in case she survived her husband. Durie, 29th January 1639, Graham *contra* Park and Gairdin. --- By contract of marriage, the husband being obliged to take a certain tenement to himself and wife, and longest liver of them two in conjunct-fee, and their heirs betwixt them; which failing, the heirs of the man's body; which all failing, the wife's heirs whatsoever; by this clause the husband was found fiar. Stair, 20th February 1667, Cranston *contra* Wilkieson. ---- A bond was granted payable to a husband and wife, and the heirs betwixt them, or assignies; which failing, to the heirs of the last liver. Here the husband was found to be fiar, tho' the wife survived. Stair, Dirleton, 23d January 1668, Justice *contra* Stirlie. ---- A tenement in a contract of marriage being disposed in name of tocher to the husband and wife in conjunct-fee and liferent, and the heirs betwixt them; which failing, the wife's heirs and assignies whatsoever. In this case, the husband was found fiar. Stair, 12th July 1671, Gairns *contra* Sandilands. ---- The like in a sum provided in name of tocher. Marcus, (*Contracts of marriage*) 20th December 1682, Ramsay *contra* Ramsay. ---- In a contract of marriage there being a clause, That, failing heirs of the marriage, the tocher should be forthcoming to the wife's heirs or assignies; and the marriage being dissolved by her death, and she leaving a child, which soon thereafter also died; the Lords found, That even after the child's death the husband was fiar of the sum in the tocher, and that the wife and her heirs were only substitute to him; but ordained the husband to employ and re-employ the sum for the use of the wife's heirs, or otherwise to find caution to make the sum forthcoming to them after his own death. Home, June 1687, Schaw *contra* Forbes. ---- By contract of marriage it being agreed, that 3000 merks, which was the husband's stock, and 4000 merks, which was the wife's, should be employed upon security to him and her in conjunct-fee, and to the heirs of the marriage; which failing, the one half to his heirs, and the other half to her heirs, &c. In this case, the wife was only found to be liferentrix. Stair, 1st December 1680, Anderson *contra* Bruce. ---- A man, in his first contract of marriage, obliging himself to take the securities of a sum of his own, and some lands he got in name of tocher with his wife, to himself and her in liferent and conjunct-fee, and to the children of the marriage; which failing, the said money and land to be equally divided

Wife's heirs
last in the in-
stitution.

betwixt her and his heirs. In this case the husband, as *dignior persona*, was found fiar of the whole, and that the wife's heirs came in as his heirs of tailzie. Fountainhall, 19th January 1697, *Laws contra Tod*. ---- A husband, in his contract of marriage, being obliged to provide the conquest to himself and his wife, and the longest liver of them two in conjunct-fee, and the children to be procreated betwixt them; which failing, the one half to himself, his heirs, executors or assignies, and the other half to the wife's heirs, executors and assignies. The Lords found, there being no children of the marriage, that the husband's heir was obliged to procure himself infest in the conquest, and to dispoñe the equal half thereof, with warrandice from fact and deed, to the wife's assigney, altho' the husband was fiar. Forbes, 5th March 1707, *Purdie contra Ross*. ---- A person having, in his daughter's contract of marriage, assigned the man and her, and the heirs of the marriage; which failing, the wife's heirs and assignies, to all goods and gear belonging to the cedent at his decease; the Lords found the wife to be fiar. Forbes, 4th February 1709; *Fead contra Maxwell and others*.

Wife's heirs
first in the sub-
stitution.

A WIFE having made a disposition of lands *uomine dotis*, to her and her husband in conjunct-fee, and to the heirs to be procreate betwixt them; whilks failing, to the wife's heirs of any other marriage; which failing, to the husband's heirs of any other marriage; which all failing, to the husband his heirs and assignies whatsoever; it was contended, that here the wife was fiar, because the subject came from her, and her heirs were first called in the substitution. The Lords found, notwithstanding, the husband to be fiar. July 1720, competition betwixt the creditors of Eliot Northsonton, and Eliot of Borthwickbrae. ---- A sum assigned by a woman in her contract of marriage, in name of tocher to herself and husband, and longest liver, in conjunct-fee and liferent, and the bairns of the marriage; which failing, to the disposer's heirs and assignies, was found to belong to the wife, and that she was fiar. June 1733; *Angus contra Ninian*.

Clause gi-
ving the wife
power of dis-
posal.

IN a contract of marriage, the husband obliged himself to take the conquest to himself and wife in conjunct-fee and liferent, with an express power to the wife to dispoñe at her pleasure upon the half thereof. In this case, the wife was found to be fiar of the half of the conquest; which was inferred not only from this power of disposal, but also because she had an opulent fortune of more value than her husband's. Stair, 27th June 1676, *Earl Dumfermline contra Earl of Callendar*.

In questions betwixt the parents and children, who understood fiar?

Right taken
conjunctly to
parent and
child.

AN assedation made to a father and his natural son conjunctly, and longest liver of them two, and their assignies, may not be disposed by the father in prejudice of the bastard, but for his lifetime, and for his own part. Colvil, 24th March 1570, *Gray contra Rollock*. ---- A tack of teinds being set to a father and his son, and longest liver of them two, and their heirs; the Lords found, That the father and the son were conjunct and equal tacksmen, and that the benefit of the teinds ought to divide equally betwixt them during their joint lives; and after the

the decease of one of them, that the whole belonged to the survivor : And therefore this pursuit being moved at the son's instance after the father's decease for some bygone years, they found, That he had only right to the half of the teinds for these years, and that his father had right to the other half, and consequently his executors. Durie, 22d June 1627, *Lidderdale contra* .---- Altho' a tack set conjunctly to a father and his son is understood to import the father a liferenter of the whole, and the son to succeed him therein after his decease ; yet the Lords found, That this takes place in no other persons to whom a tack is conjunctly set, however near their relation be, v. g. a son and his mother ; but that all such are understood to bruick the the tack equally from their entry thereto. Maitland, *ult.* November 1576, Douglas *contra* Graham.---A father being obliged to pay 1000 merks to his daughter who was married, and to the bairns to be procreated of her body, which failing, to her nearest heirs ; the Lords found, That the fee of the whole 1000 merks belonged to the mother, the bairns not being procreated at the time. Marcus, (*Bonds*) November 1685, Ord *contra* Innes.

A CLAUSE in these terms, *payable to the husband and wife in conjunct-fee and liferent, and to the heirs of the marriage in fee*, makes the husband fiar, and the heirs only substitutes. Stair, 12th December 1665, Pearson *contra* Martin.--- A bride's father obliging himself in her contract of marriage, to pay a certain sum in name of tocher, and the husband binding to add as much to it, and to take the whole to himself and his wife in liferent and conjunct-fee, and to the children of the marriage in fee ; and the husband having thereafter assigned the tocher, the Lords, in a pursuit for it against the wife's father, found, That the children could not quarrel the assignation, and that their father was fiar. Fountainhall, 24th February 1710, Earl of Bute *contra* M'Lean.

Both father and children named fiars.

A BOND conceived to Thomas Beg and his spouse in conjunct-fee, and to the bairns procreate betwixt them ; which failing, to two bairns of a former marriage, Thomas and Margaret Begg, and containing a precept of sasine precisely in terms of the destination. Upon this it was argued, That a sasine being taken not only to the two spouses, but to Thomas and Margaret Begg *nominatim*, they therefore are fiars, and that the husband is only liferenter, and cannot uplift the sum. The husband was found fiar, and Thomas and Margaret Begg only substitutes. Stair, 14th January 1663, Beg *contra* Nicolson. --- An heritable bond being payable to a father, and after his decease to his two sons *nominatim*, and all three being infest *unico contextu*, the father was found fiar, and not barely a liferenter. Stair, 23d July 1675, Ld. Lamington *contra* Moor.

Children infest as substitutes.

A BOND granted for a sum to be paid to the lender and his spouse, and the longest liver of them, at a certain term, and after their decease to their son *nominatim* in fee ; upon which infestment followed after the term, to the spouses in liferent and the son in fee. The father was found to have right to uplift the money notwithstanding his son's infestment, in respect of a clause in the bond, bearing, That notwithstanding the infestment, the debtor should remain obliged to pay the sum to the husband, his wife and their son, in manner foresaid, which was understood to refer to the above destination in the personal obligation.

Father expressed to be liferenter only.

ment. Durie, 28th July 1626, Ld. Tulliallan *contra* Ld. Clackmannan. --- A bond granted for the price of lands to the seller, and in case of his decease to his son *nominatim*, with an obligation, in case of failzie, to infest the father in an annualrent therefore, and the son in the fee thereof, was found to be effectually discharged by the father without consent of his son; there being no infestment expedite vesting the fee in the person of the son. Durie, Spotiswood, (*Contracts*) 20th February 1629, Drumkilbo *contra* Viscount of Stormont. --- A husband disposing to a second wife an annualrent out of his lands, and to the children of that marriage in fee; and having thereafter sold the lands, and a son of that marriage, as fiar, competing with the purchaser, the Lords found the sale effectual, the father remaining fiar. Durie, 9th July 1630, Veitch *contra* Robertson. --- The Lords found, That an heritable bond to a man and his wife in liferent, and to the children of the marriage in fee, the parents being infest, cannot be validly renounced by the children, till they be infest as heirs of provision to their father. Gilmour, January 1663, Ld. Dairsey *contra* Hay. --- A sum being payable to a husband in name of tocher, to be employed to himself and his wife in liferent, and to the heirs of the marriage, was found assignable to, or arrestable by his creditors, as being fiar thereof. Gosford, 10th February 1672, Weemyss and his assigney *contra* M'Intosh. --- A father disposed his lands to his son and spouse in liferent, and to the heirs of the marriage; which failing, &c. reserving his own liferent: By the conception of this disposition the son was found to be fiar. Stair, 4th February 1681, Thomsons *contra* Lawsons. --- The dispositive clause by an heiress in her contract of marriage in favours of her husband in liferent, and the heirs of the marriage in fee; which failing, to his heirs or assignies, reserving her liferent, was found to make the husband fiar; the obligation to infest, and the procuratory of resignation, being to him and her in conjunct-fee and liferent, and to the heirs of the marriage in fee, which failing, to his own heirs and assignies; and the assignation to the writs, with the obligation of warrandice, being conceived in favours of him; his heirs or assignies. Forbes, 21st November 1705, creditors of Paterson and Anderson *contra* Douglassies. --- An heiress in her contract of marriage (perfected long after the marriage, when a son thereof was existing) having disposed her lands to her husband in liferent, and to the heirs procreated or to be procreated betwixt them; which failing, to him, his heirs or assignies in fee heritably and irredeemably, reserving her own liferent; and the said contract containing an obligation to infest either by resignation or confirmation, as best should please her and him and their aforesaid, with a precept for giving heritable sasine to him or his attorney, without any mention of liferent or heirs; and in the assignation to the writs giving full power to him and his aforesaid (according to the destination of the liferent and fee above written, with reservation of her said liferent) to intromet with, uplift, &c. and mentioning the writs and rights of the lands to be delivered to him to be kept and used for the use and behoof above mentioned; and the wife having, for her further security, taken from the husband a separate bond of the same date with the contract, obliging himself, failing heirs of the marriage, to denude in favours of her, her heirs or assignies. The Lords found the husband to be a naked liferenter, and the lands not affectable by adjudication for his debt. Forbes, 27th March 1707, Fraser *contra*

tra Brown and Gordon her son. ---- A man having granted bond for a certain sum, bearing annualrent, payable to his sister and her husband in liferent and conjunct-fee, for their liferent use allenary, and to the heirs and bairns procreated or to be procreated betwixt them in fee; which failing, to the longest liver of the said spouses, their heirs and assignies, with this condition and provision, that it should not be in the power of either of them to uplift or assign the principal sum, or any part thereof, without the special advice and consent of trustees named in the bond: The Lords found, That the fee of the said principal sum did not belong to the husband, and that it was not affectable by his creditors. Forbes MS. 2d June 1714, creditors of Pringle *contra* Erskine. --- A disposition for love and favour of some shops and houses to Robert Frog in liferent, and to the heirs lawfully to be procreated of his body in fee, was found to resolve into a fee in favours of Robert Frog; who was therefore found intitled to sell the subject for payment of his debts. 25th November 1735, children of Robert Frog *contra* his creditors.

A BOND being granted to two sisters in fee, and the longest liver of them, the Lords found, That neither the husband of her who first deceased, nor his executors, had any right to the least part thereof. *In questions among children, who understood fiar?* Gotford, *ult.* January 1673, Archibalds *contra* Ogilvie. --- A father provided a certain sum to his eldest son, and in case of his decease to William and Janet his younger children equally; Janet dying, William claimed her share *jure accrescendi*. It was answered, Here was only *conjunctio verbis*, not *rebus*, for the sum is declared to belong to William and Janet equally; so that each of them had originally but right to a half. The heirs of Janet were made preferable. Stair, 5th January 1670, Innes *contra* Innes. --- Mr. Alexander Burnet minister of the British congregation in Dantzick, made his will in the year 1712, wherein he names certain trustees, (and whom he calls the executors of this his last will) *to see to the ordering and managing the following particulars*; which are, His burial, paying his debts, &c. Then he goes on to bequeath certain legacies; after which follows this controverted clause, *What ever money may be yet remaining over and above the fore-mentioned bequeathments, let it be put out upon provision, either here, or in Scotland, as shall be thought most convenient; and the yearly provision of that money be given to my sister during her life; and after her death, let the stock be divided equally amongst my brethrens children.* The question occurred upon this, Whether the money was to be split and divided among the children existing at the testator's death, to be taken up by their nearest of kin upon their decease; or if it fell only to be split and divided among the children existing at the liferentrix's death, at which time the division is appointed to take place by the testament. The Lords found, That only the children, who shall exist at the decease of the testator's sister, have right to the legacy in question. 17th December 1736, Burnet *contra* Burnet.

A BASTARD, having no children, disposed his estate under a backbond, obliging the disponsee to redispone to him and the heirs of his body allenary, and reserving the bastard's liferent. In a pursuit upon this backbond, by a party to whom the bastard had made a second disposition, found the design here, was to make the bastard a mere liferenter, *Settlement importing a liferent only*

renter, in case he had no children ; and therefore affoizied. Fountainhall, 16th November 1677, Cobbs *contra* Weemyfs.

Fiar's power of uplifting, without consent of the liferenter.

A SUM being payable, by contract of marriage, to husband and wife, his discharge without her consent found ineffectual as to her liferent of the sum. Stair, 21st January 1680, Caddel *contra* Raith.---- The fiar of a sum was found to have power to uplift the same upon securing the liferentrix, by finding surety in the place where she lived to pay her the annualrent there, during her lifetime, altho' the debtor was responsible, and the liferentrix unwilling to alter the security. Forbes, 3d December 1709, Lady Pitmedden and her husband *contra* Bathgate and Wedderburn.

F I A R absolute, limited.

Obligation to execute an entail.

THE one party being by decreet arbitral decerned to tailzie his lands to the other, failing heirs-male of his own body, and the other decerned to pay him a sum of money ; and the first having accordingly expedite a charter, and taken sasine in terms of the decreet ; but, thereafter selling the lands to a third party, the Lords found, That notwithstanding the tailzie, the granter might sell the lands upon just causes, where no guile was qualified, the decreet arbitral bearing no prohibition to sell, and in case thereof, to restore the money ; and altho' the tailzie proved unprofitable, yet that was upon the parties hazard, *quia emit quasi spem & jactum retis*. Durie, 15th July 1636, Drummond *contra* Drummond.---- A contract entred into betwixt two parties obliging them to tailzie their lands mutually to one another failing heirs of their own bodies, was found no bar from selling their lands. Durie, 14th January 1631, Sharp *contra* Sharp.

Clauses prohibiting alteration of a destination.

A WOMAN by bond, obliging herself to resign some lands in favours of herself and the heirs of her body ; which failing, in favours of her brother, and to do no deed in prejudice of his succession, upon which inhibition was served ; she thereafter marrying and disposing to her husband, the Lords found the disposition, in favours of the husband, to be a deed in prejudice of the brother's succession ; and therefore reducible upon the head of inhibition ; but they did not determine how far her onerous debts and deeds would affect the fee. Dirleton, 17th, Stair, 28th January 1668, Binny *contra* Binny.---William Craik having one son, Adam, and one daughter, Jean, made a settlement of his estate in favours of Adam, and the heirs-male of his body, &c. which failing, to his daughter Jean, &c. which failing, to the heirs-female of his son's body, &c. with this provision, " That none of the heirs of entail " should have liberty to disappoint the course of succession, by contracting debts unnecessarily, or by making deeds or conveyances in prejudice thereof. " After the father's death, Adam, the son, in his marriage-contract, made a new settlement of the estate, wherein he preferred the heirs-female of the marriage to his sister Jean, and her heirs : And he also dying without issue male, in a competition betwixt his eldest daughter Mary, who claimed the estate upon this settlement, and her aunt Jean, who claimed it upon the former, the Lords found, That

That Adam Craik could not in his contract of marriage settle the succession in favours of his own daughters, preferably to his sister. Mary here urged the onerosity of the contract of marriage, the obvious answer to which, was, That however onerous, with regard to the husband and wife, it is merely gratuitous with regard to the heirs of the marriage, especially with regard to remote substitutes, such as Mary, who is postponed, not only to the heirs-male of the marriage, but to the heirs-male of any other marriage. 29th January 1735, Craik *contra* Craik.

A BOND of provision was granted to children in these terms, *That in case they died unmarried, the sum should return to his heirs, and that they should make no assignation or other right, in defraud of his heir.* This clause was found to import, That the children could do no gratuitous deed, but that it did not hinder them to uplift or assign for necessary causes, such as their breeding to letters, merchandise, &c. Stair, 8th July 1673, Graham *contra* Ld. Morphey.--- One having granted a gratuitous bond to his nephew, "excluding assignies," and providing, "That in case of the creditor's death without heirs of his body, the bond should be null;" and the creditor, notwithstanding, assigning the bond upon the narrative of aliment and education furnished to him; and then dying without heirs of his body, action was sustained at the assignee's instance; it being found, That clauses of this nature do not bind up the creditor from assigning for necessary causes. Home,

January, Falconer, 28th February, 1683, Strachan *contra* Barclay. --- Altho' a bond of provision granted to a daughter and her heirs, bore *excluding assignies*, yet the Lords found, That she was not thereby precluded from assigning the same to her husband in her contract of marriage. Bruce, 17th December 1714, Strachan *contra* Dunbar.

A BOND payable to the creditor and certain heirs of tailzie, contained this clause, *That it should not be lawful for the debtor to make payment, without consent of one of the heirs of tailzie therein mentioned;* payment having been made to the creditor without this heir's consent, the Lords found the same unwarrantable, unless it had been done by authority of a judge; and ordained the debtor to renew the bond in the former terms, without prejudice to the creditor to declare in a process, that the sum might be affected by his creditors, or be disposed of by himself for his necessary uses. Stair, Gosford, 3d February 1674, Drummond *contra* Drummond.

Prohibition
to uplift with-
out consent.

A PERSON having disposed his estate to one grandson, and the heirs of his body; which failing, to another grandson, and the heirs of his body; which failing, to the granter's nearest heirs and assignies. A disposition by the grandson institute, in favours of his sister uterine, upon the narrative, That her father had tailzied his lands to him, was sustained, the institute being found a simple fiar, and the substitution no bar to dispoise, even gratuitously. Fountainhall, 25th January 1708, Dalgarns *contra* Durham. --- John Nairne of Seggiden, in the year 1671, resigned his lands to himself in liferent, and after his decease to Elisabeth Nairne, his eldest daughter, and the heirs of her body; which failing, to Anna Nairne, his second daughter, and the heirs of her body; which failing, to Barbara Nairne, his third daughter, and the heirs-

Simple de-
stitution.

of her body ; which failing, to return to himself and the heirs-male of his body, &c. he reserved a power to alter and to dispose of the lands, &c. thereafter, in his eldest daughter's contract of marriage, the former settlement was repeated, and the foresaid faculty renounced ; herein was also a clause, That the eldest heir-female should succeed without division, and her husband should bear the name and arms of the family. The husband of Elisabeth, the eldest daughter, became also bound to restrict his courtesy to the one half, in favours of the said heirs of tailzie. The question occurring here, Whether this was not so far a limited tailzie, that Elisabeth and her husband could not gratuitously alter the order of succession, and dispoise the estate to the third, in prejudice of the second sister ? It was found, That Elisabeth was fiar, that she might alter the destination in her contract of marriage ; and seeing she had dispoised the estate to Barbara, her third sister, that therefore Barbara had right to the same. 22d November 1728, Paton *contra* Nairne. --- Stewart of Revenston, creditor in an heretable bond of 19500 merks, made a settlement of it upon his four daughters, *their cessioners and assignies, equally amongst them, and the respective heirs to be procreate of their bodies; which failing, to Stewart of Castlestewart, with power to them and their foresaids ; which failing, Castlestewart and his foresaids to uplift and discharge the same.* Helenor, the eldest daughter, having made a gratuitous assignation of her share to her husband during the marriage, and dying without issue, the question occurred betwixt the husband of the defunct, and the other sisters, which of them had best right to this share ? For the sisters it was pled, That there was here an implied reciprocal substitution of the four sisters to one another, and failing of them all, to Castlestewart, which no gratuitous deed, done by any of them, could disappoint. Answered for the husband, The granter no doubt intended his daughters to succeed to one another preferably to Castlestewart : But, as he saw the legal succession would have this operation, he left them to succeed to one another as heirs of line, which will never imply any limitation upon any of the sisters ; especially where the right is granted to them, their heirs and assignies. The Lords found there was no such substitution in the right, as to deprive any of the daughters of the free disposal of their respective shares ; and therefore sustained the assignation. 19th December 1735, Stewarts *contra* Sir Thomas Kirkpatrick of Closeburn. --- An estate being settled in a marriage-contract to the heirs-male of the marriage ; which failing, to the heirs-male of any other marriage ; which failing, to the heirs-female of the present marriage ; the question occurred, If the heir-male of the second marriage who succeeded to the estate, there being no heirs-male of the first marriage, could gratuitously disappoint the heir-female of the first marriage ? Which he did, by disposing his estate to a stranger. For the dispoinee it was pled, *1mo.* That in this case, the granter was under no limitation with regard to the heirs-female of the marriage ; for if he was under no limitation to the heirs-male of another marriage, which is clear, far less to those postponed to them, *2do.* Destinations in contracts of marriage, tho' they limit the father, onerous *quoad* him, do infer no limitation upon any of the heirs succeeding in virtue of the destination ; because the provision is fulfilled by making over the estate to the heir-male of the marriage, and the more amply it is made over to him, the more amply is the provision fulfilled. The Lords found the son of the second marriage could gra-

gratuitously alter the destination in the contract of marriage. 6th July 1736, Edgar *contra* Johnston of Elphiehiels.

A BOND of provision being granted to children, payable at their age of twenty one, or marriage, and the portions of such as died before that age or marriage to accrue to the survivors, and one of the sisters so deceasing, and leaving her's in legacy; the Lords found, That she could not dispose gratuitously upon her bond, in respect of the condition and substitution therein; yet sustained the legacy, in so far as concerned her aliment, entertainment, expences of sickness and funerals, and expences of confirmation laid out by the legatary. Home, January 1684, Littlejohn *contra* Littlejohn. ---- The Lord Newark having made a bond of provision to his six daughters, payable at their respective ages of fifteen years, and to the heirs of their bodies, and the shares of such as should die without heirs of their body to accresce to the surviving sisters; one of the sisters assign'd her provision to her mother, and, in a competition betwixt the mother and the rest of the sisters, it was alledged for the sisters, That the substitution imported, that the defunct could not gratuitously assign, seeing their provisions were small, and the father considered that they might be better'd by hazard of the substitution; the Lords sustained the gratuitous assignation. Marcus, (*Bonds*)

Mutual substitution among children, how far it implies limitations?

February 1687, Lady Newark *contra* Collean, &c. ---- A party having granted bond to his younger children, as a competency for their better living, wherein he obliged himself to pay particular sums to each of them at the first term after his decease, "and that the same should be in satisfaction of all portion natural, or what else they could claim by his death, and that the portion of any of them happening to die without heirs of their own body should be divided equally among the survivors;" and one of the children having conveyed his provision to the heir, out of a grateful sense of good offices and services received from him; the Lords found, That he might dispose of his portion for causes reasonable, tho' not onerous, notwithstanding the substitution. Fountainhall, Forbes, 14th December 1710, Smith and Wallace *contra* Smith.

A BOND for borrowed money being taken to the lender for her life-rent use, and to her son in fee, with this provision, "That in case the son should die without heirs of his body, the sum should return to the granter and her heirs;" the Lords found, That this was not a simple substitution, but of the nature of a provision or condition, which the son could not frustrate by any voluntary deed without an onerous or necessary cause. Falconer, 10th February 1685, College of Edinburgh *contra* Mortimer.

Clause of return, and 1st in a bond, and the clause strictly onerous.

A FATHER having provided a younger son in a sum, and for his better payment set him a tack, with provision, "That if the son should die unmarried, the sum and tack should return to the father and his heirs-male; but if he should decease within year and day after his marriage, but without heirs of his body, that it should equally divide betwixt his brethren and sisters;" the Lords found, That the sum and tack might be comprised from the son for his own debt, notwithstanding the provisions and conditions above mentioned; which, they found did not prejudice the son of his right of dominion, and that, as he might have disposed the subject, so it might be comprised

2^{do}, In a bond, and the clause of a mix'd nature.

from him by his creditors. Newbyth, 7th February 1666, Ld. Tilliequhillie *contra* Ld. Leyes. ---- A father having granted a bond of provision to his daughter and the heirs of her body; which failing, to certain persons substitute, her brethren and nephews, and a great part of it to return to himself; in a question betwixt a gratuitous assigney from the daughter after her death, and the heirs of tailzie, it was argued, That the substitution implies a prohibition upon the creditor to do no merely gratuitous deed to evacuate the tailzie; the Lords sustained the gratuitous assignation. Stair, Gosford, 24th June 1669, Stewart *contra* Stewart. ---- One granted to his two daughters bonds of provision, payable to them and the heirs of their bodies, which failing to return to the granter; the clause of return here was found to operate thus far, That the daughters could not gratuitously dispoise in prejudice thereof. Stair, Fountainhall, 31st January 1679, Drummond *contra* Drummond. ---- In a bond of provision there being a clause, That the party dying unmarried, the sum should return; and she having died unmarried, but having assigned the debt before her death without any onerous cause, the Lords reduced the assignation, and found, That the defunct could not make any voluntary gratuitous assignation in prejudice of the granter of the bond; such a provision importing a limited fee. Home, December 1683, Scot *contra* Scot.

3^{to}, Where
it is merely
gratuitous.

A CHARGE on a bond being suspended on this reason, that it bore a clause, "In case the creditor died without heirs of his own body, the sum should fall in to the debtor;" who now craved, that caution should be found to reemploy it in the same terms; the Lords found, That seeing the bond was for borrowed money, and the substitution merely gratuitous, the creditor might uplift and dispose on the money at his pleasure. Fountainhall, Stair, 18th November 1680, Murray *contra* Murray. ---- The like. Durie, *penult.* January 1627, M'Ala *contra* Tenant. ---- A brother having granted bond to his sister, (but for an onerous cause) with this provision, "That if she should decease unmarried, the sum should return to the granter;" and she having assigned the bond, and then deceased unmarried; the Lords, notwithstanding the condition, found the brother liable to the assigney for the sum. Home, February 1683, Lawrie *contra* Borthwick.

4^{to}, Clause
of return in
the destination
of a land-estate.

PART of the family-estate of Douglas being given away "to the heir of a second marriage and the heirs of his body; which failing, to return to the right heir of the family of Douglas;" it was found, That this estate could not be gratuitously alienated in prejudice of the clause of return; it being argued, That here the proprietor was giving away an estate from his successors for a special use, in which this reasonable condition is implied, That when the use is at an end, himself or his heirs should have back the estate. 18th February 1717, Duke of Douglas *contra* Lockhart of Lee. ---- A proprietor having settled his estate upon his son and heir, and the heirs-male of his body; which failing, to return to himself; this was found to be a simple destination, alterable at pleasure of any of the substitutes: For here the settlement being in favours of the man's own heirs, nothing further was understood to be intended than to establish a line of succession. Home, 26th January 1726, Marquis of Clydesdale *contra* Earl Dundonald.

A Hus-

A HUSBAND having become bound in his contract of marriage, to add 2000 merks of his own to 1000 merks, stipulated by the wife's father in name of tocher, and to employ the same to him and her in conjunct-fee and liferent, and to the heirs of the marriage; "which failing, 1000 merks to belong to the wife and her heirs, and to employ "and reemploy the 1000 merks of tocher at the sight of his wife's father;" it fell out that the wife died, leaving only a daughter, who died also before the husband. In a pursuit at the husband's instance against the father-in-law for the tocher, the Lords found the wife and her heirs to be heirs of provision to the husband, and decerned the tocher to be paid to the husband, conjunct-fiar thereof; but ordained the husband to reemploy the same in terms of the contract of marriage, or to find caution for that effect, he being but a qualified fiar. *Harcus, (Contracts of marriage)* 10th November 1687, *Schaw contra Forbes* of Skellitor.

Where one is limited by a clause of return, if he uplift, must he find caution to reemploy?

In a bond of provision, with a clause of return, since there was no express obligation to reemploy, the sum was found payable to the pursuer without finding caution to reemploy, reserving to the defender his reasons of preference against any gratuitous disposition or assignation that should happen to be made. *Stair, Gosford.* 4th July 1671, *Home contra Lord Justice-clerk.* --- In a father's bond of provision to his daughter, it being specially provided, "That in case she should die "without heirs of her body and unmarried, the sum should return to "the family;" the Lords found, That she had right to uplift the sum after her father's decease, and was not bound to reemploy, or find caution to reemploy. *Harcus, (Bonds)* *Home,* February 1682, *Frazer contra Frasers.* --- A father having granted a bond of provision to his daughter, bearing for love and favour, and for her portion natural, payable after his decease, with this clause, "That in case she died "without heirs of her body, the same should return to the granter;" and she having assigned the bond for onerous causes, when she was old and having no children, the assignee in her right was found intitled to uplift the sum without finding caution to reemploy. *Forbes,* 12th, *Fountainhall,* 24th June 1707, *M'Dougal contra Agnew.* --- Alexander Irvine of Drum granted bonds of provision to his two younger daughters, 8000 merks to each, payable at their age of sixteen years, "and in "case of the decease of either before marriage, or before the age of sixteen years, then 2000 merks of the portion of the deceased sister to "fall to the survivor, and the remainder to the said Alexander Irvine "and his heirs." After their father's decease, both of them being past sixteen, they insisted against their brother for their several provisions; for whom it was alledged, That they could not have access to the said provisions, without giving security to reemploy in favours of the defender 6000 merks of the sums provided to them, in the event of the decease of either before marriage. The Lords found, That the pursuers ought either to reemploy their portions in terms of their bonds of provisions at the sight of the Ordinary on the bills for the time, or, at their option, before extract, to give bond to repay to the defender and his heirs of tailzie, such part of their portions as by their bonds of provision are provided to return in case of their decease unmarried, provided only they have so much free estate over and above the payment of their debts. 29th December 1725, *Irvines contra Irvine of Drum.*

Tocher provided in a contract of marriage, how far has the husband power of disposal?

A HUSBAND to whom the tocher was payable by the wife's father, to be employed with as much of his own upon bond "to the husband and wife, and the heirs of the marriage," having, with consent of his wife, assigned the same to a creditor, it was found, That the debtor was not bound to pay the tocher to the husband's creditors, nor to any other effect than to be laid out in terms of the contract of marriage; tho' it was argued for the pursuer, That *esto* the sum had been employed in terms of the contract, the husband would be fiar, and might apply the same for payment of his own debts; and no more is done in the present case. Durie, 21st November 1623, Logan *contra* Ld. Kinblechmont, --- In a similar case, where the tocher was arrested by the husband's creditor, the Lords decerned in the forthcoming, upon the creditor's finding caution to make the liferent effectual to the wife, and the fee to the children of the marriage: But avoided determining, if the fee of the subject could be evicted by the husband's creditors in prejudice of the heirs of the marriage. For the arrester's debt being small, it might possibly be paid by the annualrents of the sum arrested, before the husband's decease; in which event, there would be no occasion for the question. Durie, 28th June 1637, Galbraith *contra* Lennox.--- But thereafter the Lords found the tocher might be evicted, by the husband's creditors, upon finding security for the wife's liferent, without regard to the heirs of the marriage; because, they being but heirs of provision, cannot compete with creditors. Fountainhall, 23d December 1703, heirs and creditors of Chalmers *contra* Hutchison.

IN a contract of marriage, the wife, on her part, contracted 10000 merks, due to her by bond, and assigned the same to her husband; who, on the other part, became bound to add 10000 merks of his own, and secure the liferent of the whole to his wife. The husband having died without implementing his part of the contract; in a competition about the tocher, which stood out unuplifted, betwixt the relict and a creditor of the defunct's, it was pled for her, That the tocher was destined, by the contract of marriage, to be laid out for her liferent use. Answered, The husband's obligation, to employ the tocher to her liferent use, was but personal, and did not limit the property, which was absolutely conveyed to him by the assignation in the contract of marriage, without any clog or burden; and the assignation to the tocher, was not in contemplation of the jointure, but of the marriage. The Lords found the obligation to employ, not being in the assignation, was but personal, and so preferred the husband's creditor who had attached the subject. Fountainhall, 22d November 1692, Hall *contra* Lorimer. The like. Fountainhall, 27th January 1698, Kennedy *contra* Lyel. --- A wife having assigned to the husband in the contract of marriage, the sum of 4000 merks in name of tocher; the Lords in regard the prestations on the husband's part, were the mutual cause of the pursuer's assigning to him her portion; and that the husband, by reason of his insolvency, was incapable to fulfil these prestations; therefore found and declared, that the wife had a preference to all the husband's creditors for her security, upon what part of her portion remained unuplifted. Home, July 1724, Martin *contra* Lothian. Subjoined to the decision. December 1721, Selkrig *contra* Selkrig.

WITH regard to provisions in favours of heirs or children, how far the father is limited? See Provisions to heirs and children.

FIARS

FIARS of the Year.

TENANTS found liable for the neighbouring prices, tho' exceeding the fiars, tho' their master did not require them to deliver their farm; but found that they were only liable for the fiars, if they made offer of their farm to their master by instrument, and kept it for him as long as they could conveniently, unless they sold it for a greater price. *Harcus, (Summons)* March 1682, Barclay of Hiltoun *contra* Robert Symfon. --- In a pursuit at a Lady's instance for her annuity, the Lords found her obliged to accept of the fiars of the year, for the price of the victual of her liferent-lands intromitted with by the fiar, as being the standard price, known and acknowledged by law; and that she could not get him decerned for the price he truly sold the victual at, which was more than the fiars; because, if he had sold it for less, she would have claimed the fiars; and therefore, *eadem jure, uti debet*, in both cases. Fountainhall, 10th February 1686, Lady Samford *contra* the Laird. --- But thereafter, in a similar case, the Lords found the current prices must be the rule, and that the fiars are only to be laid hold upon, when no other proof can be had of the real value. January 1734, Henderson *contra* Sir Robert Henderson of Fordel. --- A creditor who debar others, and is thereby subjected to accompt for his intromissions by a rental, must state the price of the victual at the fiars, as usual in other cases, reserving to the creditors to prove that he got a higher price. Fountainhall, 2d December 1697, creditors of Bruce of Newton *contra* representatives of Johnston of Polton.

Debitor accompting.

In a compt and reckoning with a tutor, the Lords found him liable for the price of the victual, according to the fiars of the year, unless he could instruct, that the neighbouring heretors sold their victual at a lower rate; but found, where the tutor got any greater price than the fiars, that he was liable for the prices gotten. Home, February 1682, Viscount of Oxenford *contra* tutors. Fountainhall, 21st February 1679, *inter eosdem*. --- A factor appointed upon an estate, by the Lords, found liable to accompt to the creditors, either according to the fiars, or the prices he sold at, reserving to him to be heard as to what ease he may claim, upon the account of his not receiving payment from the merchants of the whole agreed prices. Forbes, 5th July 1710, creditors of Dunfermline *contra* Couper. --- A factor upon a bankrupt estate, found liable to accompt for victual-rent, according to the fiars, or according to the prices received by him, deducing all losses in the option of the creditors. Forbes, 23d January 1711, creditors of Hay of Park *contra* Falconer.

Tutors, Factors, &c. accompting.

THE fiars of a country, being not only far above the true prices, but penal, and made only to force the king's tenants to pay their rents; the Lords in determining the price of some victual, wrongously intromitted with there, ordained the current prices for which the victual in the country was in use to be sold yearly, to be the rule; and appointed the same to be proved by such witnesses as were heretors and merchants,

Wrongously intromitter accompting.

who were in ufe to trade in victual there. Home,
1685, Mudie *contra* Craigie of Gairfie.

December

FIDEI COMMISS.

A MAN in his daughter's contract of marriage, having provided her in a fum *nomine dotis*, with a clause, that she and her husband did accept of the same, in satisfaction of all she could ask by her father's decease, except whereunto she might succeed *jure sanguinis*, in case there were no other children procreated by her father; and which benefit of the said succession, in case the same should so fall out, is thereby destinated for the use of, and declared to belong to the children of the said daughter's marriage; which failing, to the daughter herself and her other heirs and assignies whatever, secluding executors. In a process, at the instance of one of the sons of that daughter's marriage, against his father and mother, concluding, that she should denude of a proportional part of what she had succeeded to, the Lords found, *imo*, That the said clause in the contract was a *fidei commiss*. in the person of the mother, for the use of the children. *2do*, They found the mother only bound to denude of the *fidei commiss*. at her death. *3tio*, That the mother had a discretionary power to divide the succession among the children. Bruce MS. 11th July 1717, Seton *contra* Lord and Lady Pitmedden.

FISHERS.

IN a process about salmon-fishers, where it was contended and offered to be proved by immemorial custom, that they were in the case of coaliers and salters; and therefore, being born on a man's ground they were *glebæ adstricti*, and so could not hire themselves to another without his consent; the Lords finding that there was no law astringing fishers to the ground where they were born, (as there is with respect to coaliers and salters) and that the custom was not general, but only in some particular places; they condemned it as a *corruptela* and unlawful, and tending to introduce slavery, contrary to the principles of the christian religion and mildness of our government; and found all fishers free to engage with whom they pleased. Fountainhall, 17th February 1698, Ld. of Udney *contra* Reid, Baveridge, and Bruce.

FORFEITURE.

If it dishab-
ilitates the re-
bel's children?
A SASINE was found null *ipso jure*, without necessity of a reduction, because given by the superior in favours of a rebel's children, after that doom of forfeiture was pronounced against him. Mait-

Maitland, 27th December 1564, Bisset *contra* Bissets. ---- In an action against the son of a forfeited person, the Lords found, That he could not be conveyed as successor to his father, and that the restitution *ex gratia* to himself made him capable of rights disposed, but could not make him heir or successor to any but the prince. Hope, (*Forfeiture*) 11th July 1618, Haliburton *contra* Lord Balmerino. ---- A forfeited person's son having produced an act of parliament, (in a removing at the instance of a party who had purchased the lands from the king) whereby he was restored, and all former acts in his prejudice rescinded; the Lords repelled the pursuer's reply upon the act *salvo jure cujuslibet*. Spotiswood, (*Forfeiture*) 27th July 1626, Earl of Nithsdale *contra* tenants of Wauchop-dale. ---- The umquhile Lord Freeland having left 1000 merks of legacy to his brothers bairns, the relict and executors of Freeland excepted against the childrens pursuit, That their father being forfeited, and his posterity declared by parliament disabled, this process could not be sustained at their instance. It was answered, That the king had given them a tutor, acknowledging that their father, by his forfeiture, was unable to govern their persons or goods. The Lords considering that the tutory pass'd under the cachet, and these who were disabled by parliament could not be habilitated but by the king's knowledge, refused to grant any process at their instance. Haddington, 1st February 1612, executors of Freeland *contra* Ruthven. ---- In an action betwixt William Hamilton of Whitehill and Margaret Stewart, daughter to umquhile Hercules Stewart, the Lords found, That albeit the posterity of the said Hercules were declared to be dishabitate by the act of parliament, yet nevertheless the said Margaret had *personam standi in judicio* to pursue the said William Hamilton, for fulfilling a bond by him to her made in 1614, whereby he was obliged to pay yearly to her 200 merks during her mother's lifetime. Haddington, 11th July 1622, Hamilton *contra* Stewart.

A PARTY who had the survivancy of a tack, being forfeited, and his escheat gifted before the decease of the tacksmen; it was found, That the donatar, after the first tacksmen's death, did, in right of the forfeited person, succeed in the tack. Maitland, 25th May 1552, Hatton *contra* Murray. ---- As an apparent heir may forfeit *spem successionis*, so resignation being made of lands in favours of a man, and the infeftment past the privy-seal, found, upon his committing of treason, that the lands were forfeited. Haddington, February 1598, Ld. of Edmondston *contra* tenants of Niddery. ---- A liferent-tack being granted to a man, and a nineteen years tack thereafter to his heir; the Lords found, That altho' his escheat fell, it could not comprehend his heir's tack; but he having thereafter committed treason, they found, That the inhability of his posterity did make even his heir's tack to fall under escheat and forfeiture. Haddington, 20th January 1602, Lindsay *contra* Ld. of Bonnyton.

TACK clad with possession before the treason, and set for a just avail as the lands were worth the time of the set, and for an ordinary indurance, is valid against forfeiture. Maitland, 14th December 1570, Home of Manderston *contra* tenants of Oldhamstocks. ---- But tacks were not sustained set for grassums received by the vassal, and eases

With what burdens it is affected?

granted to the detriment of the superior. Stair, Gosford, 28th January 1674, Dalziel *contra* tenants of Caldwell.

IN simple forfeiture the fee returns to the king *cum suis oneribus realibus*, and all infeftments and tacks granted by the vassal before the rebellion are valid; but forfeiture of a ward-vassal holding of the crown having also imply'd therein recognition, excludes all deeds of the vassal not authorised by law, or consented to by his majesty; and therefore excludes subaltern infeftments, blench or ward, but not feus so far as authorised by statute. Stair, 12th January 1677, Marquis of Huntly *contra* Ld. of Grant. ----- When a superior of lands is forfeited, found, That the vassal's Lady's terce will still be safe to her, it having fallen to her before the forfeiture; but tho' she was kept from possession till after the said forfeiture, by another Lady who had the great terce, and died not till the superior was forfeited. Sinclair, 15th March 1541, Douglas *contra* king's advocate. Sinclair, 22d June 1542, Jardin *contra* Lord Somervell. ---- But the contrary of this seems to be insinuated in a decision observed by Haddington; where the Lords made no distinction betwixt a simple forfeitry, and forfeiture inferring recognition, finding, That by the forfeiture of a sub-vassal not only his own right, but all rights flowing from him are carried. 14th July 1610, Campbell *contra* Ld. of Lochnories. ---- And this was directly found. Home, November, Falconer, 6th December 1682, Lady Caldwell *contra* General Dalziel. ---- And it was put upon this footing, That by the feudal law, upon delinquency of the vassal, of whatever nature it was, the feu did return to the immediate superior without any burden; and since, by the laws of this country, it goes to the king in several cases instead of the superior, the king must be understood in these cases as coming in place of the superior, and consequently liable to no burdens.

Competition
creditors with
the donatar of
forfeiture.

A MAN being actually fugitive for treason, altho' neither forfeited nor at the horn, yet being under summons, it was found, That his lands and goods could neither be poinded nor comprised, he being *sub reatu*. Haddington, May 1611, officers of state *contra* Inglis. ---- The creditor of a traitor having arrested money due to the traitor before the rebellion, but not having pursued a forthcoming till after the traitor's forfeiture was gifted; the Lords, in a competition betwixt the donatar of the forfeiture and this arrester, preferred the donatar, because the arrestment was but an inchoated diligence; tho' it was allowed for the arrester, that the confiscation of moveables by rebellion was but equivalent to an escheat of moveables: In which case, a creditor arresting before denunciation would be preferred. Fountainhall, 3d December 1686, General Drummond *contra* Montgomery. ----- An apprising deduced before the treason was committed, with a charge after it, but before the process and sentence of forfeiture, was preferred to the donatar. Stair, 6th July 1667, Home *contra* Home.

IN a competition betwixt the creditors upon a forfeited estate and the tenants, both founding upon an act of George I. on the one hand expressly saving the interest of creditors, on the other bestowing upon peaceable tenants, in name of bounty, two years possession without payment of rent; the Lords found the real creditors preferable to the tenants, and also the personal creditors, who had affected the rents by arrest-

arrestment before the attainder ; but they did not determine whether the other personal creditors were preferable. Dalrymple, 6th July 1716, creditors of Kilfyth *contra* tenants.

A REPLY was found relevant upon the act of parliament 1584, *cap.* 2. touching the five years possession ; altho' it was alledged, that within the five years the party's right of the lands in question was reduced. Hope, (*Forfeiture*) 20th February 1611, *contra* Quinquennial possession.

---- Found, That the act anent five years possession did not militate in favours of the heir of the forfeited person, bruiking by disposition from the donatar, except he make faith, that he has just cause to affirm that the lands were his heritage, and that he was prejudged by the want of his evidents abstracted from him. Hope, (*Forfeiture*) 10th July 1623, Lord Nithsdale *contra* Ld. Westerraw.

A SUB-VASSAL being forfeited, and his lands annexed to the crown by act of parliament, the treasurer appointed a factor to uplift the mails and duties ; and there being a multiple-pounding raised by the tenants, it was alledged for the forfeited person's immediate superior, That his casualty of nonentry was declared before the forfeiture, where-by he had right to the mails and duties till he got a vassal presented. Answered, The king cannot be vassal, and the lands being annexed to the crown he cannot validly present a vassal. Again, the king being seised *jure coronæ*, the running of the nonentry should stop, as when a vassal is infest, or a charter offered to the superior. Replied, The king cannot supply the place of a vassal, by whom the casualties of nonentry, escheat, &c. cannot fall as by vassals infest. The Lords preferred the superior. Marcus, (*Forfeiture*) March 1686, Sir John Harper *contra* the king's advocate. Forfeiture of a sub-vassal.

A CAUTIONER alledging, That he being forfeited in the late times, had the benefit of the act 18, parl. 1690, of abatement of all the years annualrents during which he stood forfeited ; the Lords found cautioners not in the case of that act of parliament ; tho' the cautioner could now have no effectual relief. Fountainhall, 8th January 1697, Carmichael *contra* Stewart. ---- The heir of a person who was forfeited in 1667 for open rebellion, pursuing the representative of the donatary upon the act rescissory 1690, not only for bygone actual intromissions, but to accompt for the rent of the estate as it stood when he entered to the possession ; the Lords found, He must accompt in that manner, and even for omissions ; the pursuer always proving what the rental was, and that he entered to the possession, and had a general and promiscuous intromission universally over all, allowing to the defender the usual deductions for waste rooms. Fountainhall, 5th December 1705, heirs of Caldwell *contra* Dalziel. ---- Upon this act it was questioned, If the onerous purchaser of a forfeited estate was obliged to accompt for the whole rents, without deducing the purchase-money ? The donatar of forfeiture had paid in to the exchequer ten years purchase for the lands, and it was argued for him, That it could not be the intention of the act, in restoring the ancient proprietor, to forfeit the innocent purchaser, who laid out his money upon the faith of the standing laws of the country. The defence was repelled, and the donatar was refused de- Act 18, parl. 1690.

duction of the price out of the rents. 24th July 1728, Cargill *contra* the relict and creditors of M'Donald.

Fugitation.

A TRAITOR being declared fugitive by the court of justiciary, a gift of his forfeiture was found null *quoad* his lands, because there was no doom of forfeiture pronounced: For all that the Justice-general does, is to charge the party accused to find caution to underly the law, and if he appear not, he is denounced rebel, and his escheat only falls; or if, having found caution, he appear not *in causa*, he is denounced fugitive, which hath the same effect, but none of them can infer forfeiture, unless doom of forfeiture had been pronounced, which the justice does not but when the defender appears. The parliament indeed forfeits absents, having taken probation of the libel; but as for the justice, unless he had either cited the party with letters of treason, under certification of treason, and that certification had been granted, or had cognosed the crime, the defender being present, the gift of forfeiture can work nothing. Stair, 30th July 1662, Yeoman *contra* Oliphant.---- The same. Stair, 22d January 1663, *inter eosdem*.---- The Lady Earlstoun, after she had disposed her liferent, being pursued before the council for the treasonable crimes of harbour and receipt, restricted to arbitrary punishment, and referred to oath, and declared fugitive and denounced; there arose a competition betwixt her assigney to her liferent and the donatar of her escheat. Alledged for the assigney, That the cedent's personal absence and contempt, could not prejudice him in whose favours she stood denuded before council citation. Answered for the donatar, That the rebel was conveyed for crimes of treason committed before the assignation, to which the sentence of fugitation must be drawn back. Replied, Tho' sentences of forfeiture, upon probation of the crime, are drawn back to the date of committing thereof, yet the declaring a person fugitive, infers only contempt in not compearing, conform to the will of the letters, upon which nothing falls but the single escheat, and the liferent, if the rebel continue year and day unrelaxed, as in the case of denunciations upon horning. The Lords preferred the assigney. Marcus (*Forfeiture*) February 1687, Hepburn of Menstry *contra* Sir Theophilus Ogilthorpe.

FEU, in what cases good against forfeiture? See Feu.

FOREIGN.

Forms of the law of Scotland can only regulate writs executed betwixt parties within Scotland, and therefore foreign writs, formal according to the law of the place, will found an action here, as being obligatory *jure gentium*.

Bond wanting witnesses.

A BOND granted in another country, formal, according to the law of the place, sustained to found an action in Scotland, tho' wanting witnesses. Haddington, 19th January 1610, Fortun *contra* Schewan.

Schewan. Durie, 15th November 1626, Galbraith *contra* Cunningham. Durie, 8th December 1626, Stranger of Middleburg *contra* executors of Smith. Durie, 15th February 1630, Harper *contra* Jeffrey. Stair, 5th July 1673, Master of Saltoun *contra* Lord Saltoun.

OATHS of Scotsmen, taken by foreign judges, by virtue of a commission from the Lords of session, were found to be of no effect, unless subscribed by the party deponer, so that the subscription and seal of the foreign judge, was found not sufficient, tho' such was the custom of that place. Gosford, 5th June 1673, Davidson *contra* Earl Middleton.---- The contrary thereafter found, and the subscription of the judge sustained; but here the deposition was adminiculated by a letter from the witness referring to his deposition. Dirleton, 5th February 1675, Burnet *contra* Lutgrue.---- A commission being granted by the Lords for examining witnesses in Holland, and the report not being signed by the witnesses, but only by the judges examiners and the clerk, which was nevertheless declared, in a paper a-part, by the said judges to be the custom of their country, and that there they give no more but notorial extracts, the deponing witnesses also attesting, That they had compared their testimonies, and found them to agree exactly; the Lords thought, That the adducer could not force them to transmit the principal depositions, and found that they were sufficiently attested by the affidavits produced, so as they might *fidem facere Judici*, and therefore sustained them as probative. Fountainhall, 19th March 1707, Cumming *contra* Kennedy.

Depositions
not subscribed
by the witness.

AN extract of a bond from Bourdeaux, subscribed by the tabellion only, bearing, That the party signed a bond insert in his register, was sustained, being *secundum consuetudinem loci*. Auchinleck, (Bond) 2d March 1627, Ld. Lamington *contra* Kincaid.---- The like. Home, February 1682, Davidson *contra* town of Edinburgh.

Extract of a
bond.

The like with regard to any thing done or transacted in another country, which cannot be subjected to the law of Scotland, whether as to proof or effect, but will be judged of by the law of the place, so far as founded in the *jus gentium*, not where merely statutory.

IN a pursuit upon a foreign bond, the defender alledged, That he had made payment in the country where the debt was contracted, and offered to prove the same by witnesses, which was sustained, for this being according to the law of the place, he had reason to trust the payment to that sort of evidence, seeing he could not foresee the creditor would be so unjust, to make a demand in another country. Durie, 16th November 1626, Galbraith *contra* Cunningham. Auchinleck, (Judge) 21st February 1633, Ld. Balbirnie *contra* Ld. Arkil. Auchinleck, (Bond) 7th February 1634, Hide *contra* Williamson. Fountainhall, 10th January 1702, Chatto *contra* Ord.---- The contrary found, and the proof by witnesses rejected. Fountainhall, 3d February 1687, Muir *contra* Muir.

Payment sustained
probable by witnesses.

Cedent's oath
sustained a-
gainst onerous
assigney.

THE cedent's oath was found good against the onerous assigney, the bond being executed in England, after the English form, and assigned also there; tho' it was argued, That the assignation was according to the Scots stile, and the debtor, tho' residing in England, was a Scotsman, and knew the custom of Scotland. Stair, Newbyth, 28th June 1666, M'Morland *contra* Melvil.

Intromission
with a de-
funct's move-
ables abroad
will not infer
vitious intro-
mission.

INTROMISSION in a foreign country with a defunct Scotsman's effects, will not infer the passive title of vitious intromission. Nicolson, (*Intromission*) 1st July 1619, Lord Dingwal *contra* Vendosme.---- The like, tho' the person died in Scotland. Marcus, (*Airs*) March 1683, Archbishop of Glasgow *contra* Burntfield.

What if betwixt Scotsmen, and to have execution in Scotland?

A BOND being granted in England with a clause of registration in Scotland, payment thereof was not found probable by witnesses, tho' such proof is allowed in England. Stair, Gilmour, Newbyth, 8th December 1664, Scot *contra* Henderson.---- A foreign bond, wanting designation of the witnesses, sustained, being according to the *lex loci*, tho' bearing a power to register in Scotland. Home, 14th February 1721, Junquet la Pine *contra* creditors of Lord Semple.

But as the laws of a foreign state have no coercive force *extra territorium*, diligence in Scotland upon foreign deeds, will be regulated by the law of Scotland.

Foreign assign-
ation must be
intimated.

IN a competition betwixt an arrestment and assignation after the English form, which requires no intimation; the Lords preferred the arrester, because, tho' a deed established according to the forms of the country, may be effectual here, yet with regard to all steps of diligence taken in Scotland, the laws of Scotland must be the rule. Fountainhall, 22d July 1708, Gray *contra* Earl Selkirk.

English act
of curatry.

CURATORS given to a minor in England, were found sufficiently qualified to authorise a minor in a pursuit carried on in Scotland, and the Lords refused to compel the minor to name curators again by the law and form of Scotland; and yet an act of curatry is a judicial act, and the curator has his powers from the judge, not from the minor. Durie, Spotiswood, (*Tutor*) Hope, (*Curators*) 12th November 1624, Nasmyth *contra* Nasmyth.

Process in
Scotland upon
a foreign deed.

BY the law of England the heir is not liable to pay his predecessor's debts unless where the predecessor expressly binds his heirs as well as himself. In a process against the heir who succeeded to his estate in Scotland, for payment of a promissory note, contracted by the predecessor

cessor in England, where he had long resided and made his money ; it was objected, That the heir was not bound in the promissory note ; That the *locus contractus* must be the rule, and that, if the obligation was so limited as to be good only against the executors in England, it would be absurd to give it a stronger effect when pursued in Scotland. It was answered, That whatever peculiarity may be in the practice of England, we follow the law of nations, which makes people's effects liable for payment of their debts : And therefore, provided a foreign deed be habily executed, according to the forms of the place, we give it all effects that such a deed can have executed in Scotland. The Lords sustained process against the heir. 12th July 1739, Kinloch *contra* Fullerton.

In a pursuit in Scotland upon an English double bond, the defender denied the subscription, and insisted upon the law of England, that the bond was not probative, unless the pursuer would prove by the witnesses insert, that it was *factum* ; the Lords found this impracticable at this distance, and therefore repelled the alledgeance. Fountainhall, 10th January 1702, Chatto *contra* Ord.

Personal bond executed according to the forms of the place, must be effectual in Scotland, tho' it be to dispoise subjects in Scotland.

A MUTUAL contract having been executed in England betwixt two brothers, whereby they became bound, that failing heirs, the survivor should enjoy the other's estate, was found effectual at the survivor's instance, to reduce a gratuitous disposition of lands granted by the defunct in prejudice of the contract ; tho' it was pled, That the contract, being not according to the forms of the law of Scotland, cannot be effectual to carry any land-estate here, in respect it was answered, That there is a solid difference betwixt a deed of conveyance and a personal obligation ; the law of Scotland, as it regulates all deeds granted in Scotland, so subjects locally situated in Scotland, must be governed, as to their transmission from hand to hand, by the same law ; but an obligation executed in a foreign country, cannot be directed by the law of Scotland, and being once effectual by the law of the place, it must be effectual as to every stipulation contained in it, whether to pay money or dispoise effects, after which the debtor, by changing his place, and retiring into Scotland, does not cease to be bound ; for change of place can found no exception against an obligation once habily constituted. Forbes, 5th July 1706, Cuninghame *contra* Lady Semple.--- Yet a disposition of an heritable jurisdiction in Scotland, made in England after the English form, was not sustained even against the granter, to oblige him to grant a more formal disposition ; tho' it was pled, That such a disposition must at least have the force of an obligation good against the granter and his heirs, tho' it would not avail in a competition with a more formal right ; and if such a disposition would produce action in England against the granter, to renew a more formal right, it must be also a good ground of action in Scotland, seeing obligations of whatever nature, executed *secundum consuetudinem loci*, are
4 L 2 effectual

effectual in Scotland.
Book.

February 1729, Earl Dalkeith *contra*

But effects locally in Scotland must be under the direction of the Scots law, as well as persons in Scotland, and the conveyance of such effects must be in the Scots form, just as much as an obligation granted in Scotland to one in another country.

Heritable
subject be-
queathed in
testament.

A SCOTSMAN abroad, *animo remanendi*, having made his testament, wherein he divided his lands and moveables equally amongst his children, the same was found not effectual in Scotland, to carry the land-estate from the heir at law, tho', by the *lex loci*, lands were testable. Durie, Haddington, 9th December 1623, Hendersons *contra* Murray. --- The like, with regard to a legacy of an heritable bond addebted in Scotland. Durie, 3d July 1634, Melvil *contra* Drummond.

Testament
made by a ba-
stard.

A SCOTSMAN born bastard, dying in England, his goods will fall under escheat to the king, and his donatar will have right thereto, notwithstanding any testament made by the bastard, and confirmed in England, and albeit that bastards are alledged to have *testamenti facti- onem* there. Haddington, 1st February 1611, Purves *contra* Chisholm.

Nuncupative
will.

A NUNCUPATIVE testament has no effect in Scotland beyond L 100 Scots; and this not for want of proof, for it would be the same, tho' it were offered to be proved by the oath of knowledge of the nearest of kin; but for this reason, that writ is an essential solemnity in the nomination of an executor or universal legatar, or indeed of any legatar above L. 100 Scots. For this reason, a nuncupative will made in England, tho' good by the *lex loci*, was not sustained to carry moveables in Scotland, tho' if the moveables had been in England at the time, and afterwards conveyed to Scotland, the case had been more doubtful. And it was not regarded what was pled for the pursuer, That *mobilia sequuntur personam, & non habent sequelam*; for it was thought, that an estate in Scotland, whether heritable or moveable, must be governed by the laws of Scotland, and that a nuncupative testament can no more convey a moveable estate in Scotland, than a written testament can convey an heritable estate. Stair, Gilmour, Newbyth, 19th January 1665, Schaw *contra* Lewis.

Testament
confirmed in
England.

A TESTAMENT confirmed in England by an executor nominate, sustained as a good active title here, altho' there was no inventory given up, not being the custom of England; and yet it may be thought that confirmation being the sentence or warrant of a judge, can have no effect *extra territorium*. Durie, 16th February 1627, Lawfon *contra* Kello. --- But a legatar was found obliged to confirm, where the executor appeared and renounced the office. Durie, 25th February 1637, Rob *contra* French. --- One dying abroad, tho' by the law of the place his nearest of kin, without confirmation, have right to all debts or goods belonging to him, yet, if the debt be due by debtors in Scotland, or the goods be in Scotland, they cannot pursue for the same, unless

unless the right thereof be settled upon them, according to the form of the law of Scotland, by confirmation if moveable, or by service if heritable. Stair, 18th, Dirleton, Newbyth, 19th July 1666, Bisset *contra* Brown. ---- The probat of a written testament sustained as a title to found a process here, the pursuer confirming before extract. Bruce, 21st January 1715; Wardlaw *contra* Maxwell.

ASSIGNATION made in foreign parts of a bond due by a debtor in Scotland, sustained, tho' wanting witnesses, being according to the form of the country. Durie, 11th December 1627, Falconer *contra* heirs of Beatie. ---- An assignation made in England of effects in Scotland, and granted by one Scotsman to another, found good, tho' the writer was not designed, being formal by the law of England. Durie, 16th July 1636, Sinclair *contra* Murray. ---- The like, where the assignation was subscribed but by one notary. Newbyth, 15th December 1664, Erskine *contra* Ramsay. ---- An assignation being made beyond seas according to the *consuetudo loci*, by way of instrument of a notary, a tabellion having retained the warrant in his hands signed by the parties, was sustained, because of the custom of the place. Dirleton, 28th November 1676, Scot *contra* Toish.

Assignation
to moveables
not in the Scots
form.

Prescription by the law of which country regulated?

A BOND granted in England, being prescribed by the English law while the parties resided there, was afterwards made the foundation of a process in Scotland; in which the Lords repelled the English prescription, in respect the bond was drawn in the Scots form betwixt Scotsmen, and bearing a clause of registration for execution in Scotland. Gilmour, November 1664, Graden *contra* Ramsay. ---- In a pursuit for payment of furnishing made at London, objected, The debt is prescribed *quoad modum probandi*, by the lapse of three years, Answered, The statute referred to, being local and municipal, derogating from the common law of nations, it cannot take place against strangers, but the *locus contractus* must be the rule; the Lords repelled the prescription. Fountainhall, 11th January 1695, Philips and Short *contra* Stamford of Newmills. ---- Against an accout furnished to a person when at London, the triennial prescription being objected; answered, The *locus contractus* must be the rule, merchants or tradesmen who trust foreigners, not being obliged or supposed to know the municipal laws of other countries. 2do, The Scots law cannot regulate contracts not made in the country, whether with regard to the form or endurance. The pursuer was indeed under the authority of the Scots law, with regard to every step taken after he brought his process in Scotland; but, *esto*, *locus contractus* should not be the rule, yet the Scots prescription could not commence, while he remained in England, not subjected to the jurisdiction of the laws of Scotland; and therefore to make *termini habiles* for the prescription, the creditor must be three years in Scotland before commencing his suit. To the *first* replied, That as the creditor must lay his account to follow the *forum* of his debtor, he must lay his account to be subjected to the laws of that *forum*. To the *second*, The act 83, parl. 1579, is directed against the action, and in favours of the debtor, that no action shall be pursued after three

4 M

years,

years, without regard where the debt was contracted. And this must be so, otherwise no prescription at all could run against a debt of this kind; for the English prescription can have no force *extra territorium*; nor can the Scots judges be bound to determine upon any penal law made in a foreign country. The Lords sustained the defence of prescription. Forbes, 16th, Fountainhall, 17th July 1708, Thomson and Hay *contra* Earl of Linlithgow. --- A merchant-traveller having died in England, his brother intromitted with his effects *sine titulo*, and during the currency of the negative prescription of six years, introduced by the English act of Limitation, retired into Scotland; being sued here, his defence was upon the said act of Limitation, which the Lords sustained. Bruce MS. Home, 4th July 1717, Rae *contra* Wright. --- A supercargo having borrowed money in Virginia, drew bill on his *constituents* for the same. In a pursuit upon this bill after it had lien over for six years, the question occurred, Whether the act of Limitation, comprehending bills, should be the rule; or if the question of prescription should be regulated by the laws of Scotland, the bill being drawn upon Scotsmen residing in Scotland, and payable there? The Lords repelled the prescription, and found the law of Scotland must be the rule. 25th July 1732, Rogers *contra* Cathcart and Ker. --- In a pursuit for an accompt of drugs, furnished from year to year by a druggist at London to an apothecary at Edinburgh, the Lords repelled the defence of the triennial prescription, and found, that the matter must be regulated by the act of Limitation in England, being the *locus contractus*, and not by the act concerning prescription of accompts made in Scotland. November 1731, assignies of Thomas Fulks *contra* Aikenhead. --- In a process for recovery of money lost at play with the triple value, founded upon the British statute, 9th queen Anne, the defence was, That the action being brought upon a penal statute, and for a penalty, was fallen by the lapse of a year, in terms of the English statute, 3^{mo} *Elisab. cap. 5.* declaring, That no action shall be sustained upon any penal statute, made or to be made, unless within one year of the offence. And it was pled, That as this is a sovereign law in England, it must regulate the said penal British statute 9th queen Anne, the same way as if the limitation were ingrossed in the act. Answered, It is by no means the same; the action arising upon the British statute is in its nature perpetual, because not limited by the act. The act of Limitation, so far as its authority goes, will found a defence, so as to take away the action *ope exceptionis* only; but as the laws of England have no authority here, the said act of Limitation cannot be founded upon to bar the action. The Lords repelled the defence, 19th January 1737, Murray *contra* Cowan. --- Against an action for payment of an accompt of furnishing made to a Scotsman at London, which was offered to be proved by the defender's oath, a *no process* was objected, founded upon the English act of Limitation; which declares, that no action does ly after six years. Answered, 1^{mo}, No penal statute is authoritative *extra territorium*. The English statute may have this effect in Scotland, to infer a presumption, either that the debt is not due, or that it is paid; but this presumption is taken off by the mean of proof condescended on. 2^{do}, Were the question to be tried in England, the statute would be found not to take place, because of a late statute, 4^{arto} *Ann. cap. 16. § 19*, which declares, That the prescription shall not run so long as the debtor is beyond
beyond

beyond seas; and the defender has been all along in Scotland, which is the same case. The Lords found the pursuit not cut off by the English prescription. 9th February 1738, Rutherford *contra* Sir James Campbell of Aberuchil.

Annualrent by what law regulated, whether of the creditor's country or debtor's?

A PARTY being pursued upon an English bond granted in Ireland to Irishmen, the Lords restricted the sum to the half, conform to the condition of the bond, and to the annualrent of six *per cent.* only allowed to be taken by the laws of Scotland, tho' the double came in place of annualrent, which was ten *per cent.* in Ireland; nor could their Lordships adject any *salvo*, (as the pursuer craved) reserving the rest to be obtained from the Irish judicatories; but found, that the pursuer must give a discharge of the whole, and that the debtor was not bound to accept of such a partial receipt. Forbes, 25th, Fountainhall, 27th January 1710, Savage *contra* Craig.

Foreign decrees how far effectual in Scotland?

A COPARTNER in a trading company having recovered a decree of the king's bench against the cashier of the company for his intromissions; and applying to the court of session to interpose their authority, in order to execution; the Lords sustained the decree, the pursuer instructing that he was a partner, and the defender cashier. Forbes MS. 3d December 1713, Goddard *contra* Swinton. --- A person in whose chambers at London a fire broke out, being pursued for the damage, and a decree of the king's bench recovered against her, retired into Scotland with her effects; but the pursuer insisting against her here, founding upon the decree of the king's bench, the question occurred, If it ought to be sustained as *probatio probata* in Scotland, and execution awarded upon it, unless it be shown to be null upon the law of England; or if it is only to be sustained as a libel? The Lords found, That execution ought to pass upon this decree, unless something competent in law or equity be objected against it. Home, 29th December 1720, Edwards *contra* Prescot.

A BOND betwixt two Scotsmen at London, in the Scots form, and registrable in Scotland, being challenged by the granter, before the court of chancery, and the creditor once appearing, but thereafter withdrawing, and sentence pronounced, reducing the bond; this was not found such a *res judicata* as to bar the creditor from pursuing for the debt in Scotland. Fountainhall, 24th February 1698, Cochran of Ochiltree *contra* Earl Buchan. President Dalrymple, who observes this decision, June 1698, makes this remark, That if the creditors had provoked to judgment before the chancery, it is like the Lords would not have found the decree reviewable at his instance who had made election of the judicature. --- Captain Hamilton having arrested the effects of the Dutch East-India company, *jurisdictionis fundandæ gratia*, brought an action against the company, for damages alledged sustained

by him, through their violent seizure and confiscation of a ship and cargo belonging to him in the East-Indies; the defence was, That the ship and cargo in question were in due course of law condemned and confiscated in the council of justice of Malacca; which, upon Captain Hamilton's appeal, was confirmed by the council of justice at Batavia; and therefore they are *safe exceptione rei judicatæ*. Which exception the Lords sustained. 24th July 1731, Hamilton *contra* Dutch East-India company.

FOREIGNER.

Foreigners,
if they can
hold land in
Scotland?

IN the ranking of the creditors of the Lord Kincardin, it was alleged, That an infeftment of annualrent, granted in favours of Henry Vansomerdyke, could not be respected, because he was a stranger not naturalized, and so not capable to acquire a feu in Scotland. Answered for Henry Vansomerdyke, That his lady being a French woman, and himself a subject of France, where he hath a marquifate, and lives frequently with his family, he had the benefit of the general act of naturalization granted to the subjects of France in queen Mary's time. *2do*, This is not an infeftment of property, but of annualrent, which is but a servitude. *3tio*, If strangers, not naturalized, were not allowed to acquire rights in Scotland, then all our commerce with these would cease, seeing they are oftentimes put to apprise or adjudge their debtor's lands for satisfaction of their debts. Reply'd, Strangers have an easy remedy by procuring naturalization, and if a stranger died, the retour could not bear him to have died *ad fidem domini regis*, (which is a point of the brief) seeing a stranger is under no fidelity, and seeing the subjects of this kingdom are not capable to purchase in France, unless they be denized, no more ought the French be capable here, nor is this party properly a Frenchman; so that it were *fiçtio fiçtionis* to allow him the privilege of a French subject. The Lords demurred to give answer to the point, but allowed the stranger's right to be ranked in its own place, that he might intromet with the annualrents upon caution, till the point was decided. Marcus, (*Infeftment*)

March 1683, the creditors of Lord Kincardine *contra* Henry Vansomerdyke.

Bound to
find caution
for expences in
initio litis.

ONE constituted factor by a foreigner, for levying debts due to the foreigner here, having insisted in name of his constituent for payment of a debt, which, during the course of the process, was proved to have been already paid to the foreigner himself; the Lords found the factor liable in expences, tho' it was urged as quite unprecedented, That agents or factors, whether for natives or foreigners, should be found liable for expences occasioned by their constituent's fault; That the proper remedy, when a foreigner gives mandate to pursue, is to insist for caution *in initio litis*, and where that is omitted, the defender has himself to blame. 16th June 1738, Pringle *contra* Kennedy. --- The like. 25th July 1739, Horn *contra* Robertson.

A FOREIGNER who, by his mother a Scots woman, succeeded to some effects in this country, pursuing an exhibition of writs, authorised by a tutor-dative, given him by his majesty; and it being controverted whether the king could appoint a tutor to a foreigner, seeing none could be served tutor to him in Scotland. The Lords, waving the general point, sustained the tutor-dative to supply a curatory *ad lites*, so as to authorise the pupil in the present action. Durie, 17th, Spotiswood, (*Tutor*) 18th December 1627, Donaldson *contra* Brown.

If a tutor
can be given to
a pupil who
is a foreigner?

FOREST.

THE king, under his hand, having granted a gift of erection of a gentleman's lands into a forestry, the exchequer demurred to give a charter upon it, and recommended to the Lords to hear parties, and to give their opinion, what the import and privilege of a forest is by law, and whether it be prejudicial to the king's forestry, that a new gift of forestry be past; the Lords having considered the acts of parliament anent forestries, *viz.* act 12th, parl. 1535, act 84th, parl. 1579, and act 130th, parl. 1592, they ordained a report to be made to the exchequer, to this effect, That the import and privilege of forestries is, "That all cattle put in the king's forests be taken and brought to the king's prison to be escheat, two thirds to the king, and one third to the keeper of the forest;" and if other landed men have hained forests of their own, they may escheat the goods to their own use; and by another act there is a jurisdiction to the keeper of the king's forests, but no forests are allowed to private persons upon their own property, but such as have hained woods and forests (which must be inclosed with dykes) by the said first act, and by the second, instead of escheating the goods, other penalties are imposed, against these whose goods come in to inclosures, orchards or parks of private persons; that the opinion of the Lords is, That representation be made to the king against the granting of new forests, as prejudicial to the king's old forests, and to his lieges. Stair, 24th June 1680, Marquis of Athol *contra* Ld. Faskellie.

FORISFILIATION.

A DAUGHTER, at her marriage, being provided by her father, beside the tocher, to be a bairn in the house, provided all his other children were forisfiliat at his death; the Lords found, That two of them, who continued to stay in the house, and were unmarried till his decease, but had got as much provided them as the pursuer's tocher amounted to, were thereby understood forisfiliat. Durie, 1st February 1622, Smith *contra* Ellies.

FORUM COMPETENS.

Forum competens ratione domicilii.

THE Lords refused to sustain themselves judges betwixt two foreigners, being in this country occasionally, *non animo remanendi*, especially in matters of debt contracted forth of the country; but if the debt be contracted to be paid in this country, the Lords in such a case will be judges. Haddington, 23d November 1610, Vernour *contra* Elvies.---- In a reduction of a decret against a soldier, pronounced by the bailies of a town, where the regiment lay for the time, and he personally warned; it being alledged, That he was not 40 days there, and so the decret was pronounced *a non suo iudice*; yet the Lords considering, That soldiers have no fixed dwelling, but must remove at their commander's order, unless when in garrison, found his being there when cited sufficient. Fountainhall, 12th November 1709, Lees *contra* Parlan.---- A gentleman of Haddington-shire, but within six miles or thereby of Edinburgh, being pursued before the sheriffs of Edinburgh, as one who had his residence as often there as in the country, and that he had *larem & focum* with his mother-in-law in Edinburgh, and a seat in one of the churches there; the Lords thought that such gentlemen, as lived at so small a distance, were liable to both jurisdictions, and therefore repelled the reason of advocacy, and remitted the cause to the sheriffs of Edinburgh. Fountainhall, 15th July 1701, Spotswood *contra* Morison.---- The Lords turned into a libel the decret of an inferior judge, fining a party for a riot, in regard of the incompetency of that court to judge therein, in so far as the *locus delicti* was within another jurisdiction, wherein also the defender had his *forum domicilii*, being at that time resident at a writer to the signet's country-house, whose apprentice he was, tho' not an house-apprentice; and altho' the father, whose eldest son he was, had both his dwelling and whole estate within the jurisdiction where the son was attached. Fountainhall, 14th February 1708, Thomson and procurator fiscal of Dunblane *contra* Wright.

THE pursuer and defender being within the same jurisdiction, the Lords found, That the action may proceed before their own judge, altho' the thing in question be within another jurisdiction. Colvil, 7th March 1579, Johnston *contra* Johnston.

Forum delicti.

FORUM *delicti* was found sufficient to make the judge of the place competent, altho' the defender had no domicile, nor did reside within the jurisdiction. Sinclair, , Lundie *contra* tenant.---- Found, That a baron bailie and his officer may pursue and follow after a stranger, and apprehend him or his goods, even without the barony, for a riot, &c. committed within the same. Nicolson, (*Forum competens*) 8th January 1611, Baillie *contra* Lord Torphichen.---- A forgery committed in Scotland by a Scotsman, may be challenged before the Lords, and improbation will pass against the deed, that it

it may be cancelled, tho' it relate not to any subject lying in Scotland, being a conveyance of an estate lying in a foreign country. Stair, 6th February 1672, Murray *contra* Murray. Falconer, 14th February 1683, *inter eosdem*. ---- The Lords found, That a scandal being committed in Edinburgh, the action may be pursued before the commissaries there, as being the *locus delicti*, altho' the party delinquent had his family in another commissariot, he himself having been 40 days in Edinburgh before the date of the citation. Gosford, 18th November 1673, Gordon *contra* M'Culloch.

A BARON having unlaw'd his tenant for blood, the decret was found null, and the matter still entire to be tried by the sheriff, because the fact was not done upon the baron's ground, nor did the party hurt live within his jurisdiction, nor make his complaint there. Durie, 28th July 1630, Ld. Freeland *contra* Sheriff of Perth.

Forum competens ratione rei sitæ.

THO' a town be exempt from the sheriff's jurisdiction, the magistrates thereof may be pursued before the sheriff, when the subject in controversy is within the jurisdiction of the shire. Colvil, February 1581, Lawson *contra* magistrates of Edinburgh. ---- Magistrates of towns, and other inferior judges, have jurisdiction *ratione rei sitæ*, as to the right of lands or houses within their bounds, tho' the defenders dwell without their jurisdiction, they being cited by virtue of letters of supplement, granted by the Lords of session. Durie, 28th November 1635, Williamson *contra* Haigie. ---- Persons being convene'd as intrometters with a defunct's goods before a commissary, within whose bounds they dwelt not; the commissaries decret was found null, altho' the defunct died within his jurisdiction, and the testament was to be confirmed there, and the said goods lay within the bounds, and were intrometted with by the defenders there. Durie, 5th February 1623, *contra* . ---- Altho' a party defender and his family were residing at London, *animo remanendi*, and that the pursuit was upon a contract made in England; yet process was sustained by the Lords to have execution against the defender's person when he came to Scotland, and against his goods there, he being a Scotsman and summoned personally in Scotland. Durie, Auchinleck, (*Strangers*) 7th March 1629, Muirhead *contra* Wilkie. ---- Process was sustained by the Lords upon a bond granted in Ireland, after the Irish form, against a Scotsman, tho' he, with his family had resided 14 years and were still residing in Ireland, and he made a denizon thereof; the pursuer having declared, That he sought only execution against such lands and goods as the defender had in Scotland. Durie, 15th November 1626, Galbraith *contra* Cuninghame. ---- A Scotsman residing in Holland, *animo remanendi*, being pursued in Scotland, the process was sustained against him, being a Scotsman, but only to produce execution against the defender's goods which he had within Scotland. Durie, 8th December 1626, Lord Blantyre *contra* Forsyth. ---- The direct contrary was found. Durie, 23d March 1639, Colonel Brog's heir *contra* , where the Lords declined themselves as incompetent, even with respect to the defender's goods in Scotland. ---- It being objected against a pursuit for payment of a debt, That the defender had been 24 years out of

of the country, *animo remanendi*, and therefore not subject to the jurisdiction of the court; the same was repelled, seeing the bond was made betwixt Scotsmen, and the pursuit was in order to affect the defender's goods in Scotland. Durie, 1st February 1642, Douglass *contra* Cuninghame. ---- A lady liferentrix being pursued by the heir to uphold and repair the houses on the liferented lands, in the terms of law, before the sheriff of the shire where the lands lay, she dwelling in another county, the Lords advocated the cause from the sheriffs to themselves, tho' the sheriff, *in prima instantia*, was acknowledged competent, had the defender dwelt within the jurisdiction. Fountainhall, 14th July 1697, Stewart *contra* Scot.

A PROMISSORY note of L. 200 alledged accepted by a Scots gentleman when abroad, being sent to this country, and payment demanded; the gentleman, by a summar application, setting forth, That the person in whose hands it was, and who made the demand, was a London attorney, and about to leave the country, obtained the promissory note to be sequestered as a forged deed, and thereafter went on in an improbation. Sometime thereafter the attorney made an application to the court of session to have the note restored, alledging, that he had given his obligation to restore the note, or pay the contents. And the Lords, in respect the creditor in the note was not subject to the jurisdiction of this court, and that no judicial demand was made thereon to found a jurisdiction, therefore ordained the note to be delivered back to the petitioner. 18th November 1737, Sir Hugh Dalrymple of North-Berwick *contra* Alexander Ross solicitor in London.

Arrestment *jurisdictionis fundanda gratia.*

Arrestment
of the debtor's
person.

A STRANGER being pursued before the admiral or any other judge, ought to find *cautio judicio fisci* & *judicatum solvi*. Balfour, (*Caution*) 27th March 1527, Curl *contra* Watson. ---- Upon application to the Lords by bill, warrant was granted to secure the person of a stranger, till he should find caution *judicio fisci*; but at the same time the pursuer was also ordained to find surety for the pursuit of the action and damage, and interest, in case he prevailed not. Maitland, 22d January 1564, an Englishman *contra* Angelo an Italian. ---- There being mutual processes betwixt a Scotsman and an Englishman; the Scotsman dying during the dependence, and after litiscontestation, and his heirs incarcerating the Englishman by virtue of a summary warrant for arresting his person by an inferior judge; the Lords, in a suspension, thought it inconvenient to alter such general custom, and therefore refused to set him at liberty, unless he found caution *judicio fisci*, &c. but judged it likewise suitable, that the pursuers should also find caution to him, in case they succumbed, to refund his damages and loss by the wrongous imprisonment. Fountainhall, 6th February 1701, Ayrie *contra* Chatto's.

Border-law.

A STRANGER who is adebted to a Scotsman, coming to this country, may be charged by an officer, at command of a bailie, to enter in ward, till he find caution to answer as law will. Haddington, 22d January 1611, *contra* . ---- Notwithstanding the act of parliament, touching arresting persons within burgh, the Lords found,

found, That Englishmen may be arrested in any burgh upon the Scots side of the border, tho' by strangers and no burgers; this being the practice on the English-side. Gosford, 13th January 1676, Robertson *contra* Bell. --- An Englishman being arrested near the border, tho' neither by a sheriff nor bailie of regality, but by a simple baron-bailie, according to the border-law; the Lords sustained the arrestment. Forbes, Fountainhall, 20th July 1705, Pots and Hunter *contra* Mitchellson and Robertson.

ONE being arrested in a royal burgh for goods bought therein, finding caution to answer as law will; this was found sufficient to subject him to the jurisdiction of the burgh in this cause, tho' living under another jurisdiction. Durie, 31st January 1633, Stevenson *contra* Law. Burgh-law.

ARRESTMENT was granted by the Lords, at the instance of an Englishman, upon the goods of another, neither of them being in this country *animo remanendi*, founded upon bonds made in England, not bearing any condition of payment to be made in Scotland. Haddington, December 1610, Elvies *contra* Vernon. --- A person having given in a bill to the Lords, setting forth a claim he had against a Frenchman, and craving warrant to arrest the Frenchman's effects in this country *jurisdictionis fundandæ gratia*, and until caution should be found *judicio fisci & judicatum solvi*. Answered, The Frenchman is not subject to the jurisdiction of the court. Replied, By the custom of nations, strangers found here may be arrested till they find caution *judicio fisci & judicatum solvi*; the same rule must hold as to their effects, seeing a process cannot be raised against a party not subject to the jurisdiction of the court, in order to found an arrestment upon a dependence. The Lords ordained the Frenchman's effects in Scotland to be secured, till he should find caution *judicio fisci & judicatum solvi*, in so far as these effects amounted to, and no further, tho' the claim should exceed the effects. Marcus, (*Exhibition*) December 1683. Arnold *contra* Young. See Fountainhall, 22d February 1684, *inter eosd.* Arrestment of the debtor's effects.

A STRANGER pursuing a Scotsman by his procurator here, and the Scotsman craving, That the procurator might be ordained to find caution *judicio fisci & judicatum solvi*, in a pursuit of reconvention which he was to intent against the constituent: This was refused by the Lords; but Durie adds the reason, that there was yet no action intended against the procurator, as representing the constituent; and supposing such an action, he is of opinion, the constituent might have been bound to find caution, that whatever he should recover by this process against the defender, it should remain liable to him in his reconvention. Durie, 9th February 1628, Kirkhead *contra* Nairn. --- A procurator having mandate to pursue for the behoof of strangers out of the country, was found obliged to sustain a contrary process at the instance of the defender; the reconvention being upon a fact that did arise, and was incident to the principal process. Stair, 18th November 1675, Vans *contra* Sandilands. Reconvention.

Arrestment
laid on in the
hands of a per-
son not subject
to the jurisdic-
tion.

AN arrestment at the mercat-cross of Edinburgh, pier and shore of Leith, of effects belonging to the common debtor, in the hands of an English merchant residing at Bristol, and who had no *forum* in Scotland, was found null and inept, 26th July 1733, *Couts contra Miln.*

Forum competens, with regard to executors, factors appointed by the Lords, &c.

THO' regularly an English executor is not bound to accompt in Scotland, or any where, save in the court whence he derives his powers; yet a creditor having got letters of administration in England, and thereupon intromitted with the defunct's moveables, and thereafter pursuing the heir in Scotland, the defence was sustained *quod presumitur intus habere*, tho' the creditor alledged she had applied her intromissions otherwise, and was not bound to accompt in Scotland: For no law can justify twice payment.

July 1732, White *contra* Skene of that ilk. --- An English woman, who was administratrix in law to her husband in England, pursuing for a debt resting to herself in Scotland, the defender alledged compensation upon a debt owing to him by the pursuer's husband, for which she is liable as administratrix. Answered, The pursuer cannot be liable as administratrix in England for debts due in Scotland, seeing she is not confirmed executrix as to any sums owing there to her husband; and as administratrix of his English debts, can only be pursued in England, where he who was an Englishman died. The Lords sustained the answer made for the pursuer. Marcus, (*Executry*) March 1684, Dryden *contra* Eliot of Dunlabyres.

Testament, within which district must it be confirmed?

A TESTAMENT-DATIVE was found null, because the executor being decerned before one commissary had confirmed before another. Spotiswood, (*Testament*) 21st July 1629, Balcanquhel *contra* Balcanquhel. --- A defunct's testament must be confirmed by the commissary of the diocese, within which his principal dwelling-house is, where he died. Haddington, 25th June 1611, old Ld. of Abercromby. --- In the confirmation of a defunct's testament, the commissary of the district was preferred, where the defunct's principal residence was, and where his estate lay, tho' he died in Edinburgh, and had lived there several months with his lady, servants and children, and had a house taken for a year, with his own furniture; which was found, because Edinburgh was not his principal habitation, he not being there *animo remanendi*, but about business. Stair, 7th, Dirleton, 17th February 1672, commissaries of Edinburgh and Brichen *contra* Earl of Panmuir. --- Some creditors of a deceased Lord of session having confirmed a sum due to him, as executors-creditors, before the commissary of the bounds where the defunct's estate lay, and where his lady and family resided, and laboured a room, to which also himself used to retire in vacation time, and at which place he died; but other creditors having confirmed the same subject at Edinburgh, where the defunct had necessarily his domicile for six months of the year, and sometimes also in vacation time

time when on the bills; besides, that Edinburgh is *communis patria*. The Lords decided in favours of the confirmation before the country commissary. Fountainhall, 7th January 1708, creditors of the Lord Merfington competing.

THE commissaries of Edinburgh have a right to confirm the testaments of all persons dying out of the country; unless where having a settled residence within the country, they are only abroad occasionally *sine animo remanendi*; in which case, the commissary of the district where they dwell is preferred. Stair, 22d November 1661, Douglas *contra* Johnston. --- The like. Marcus, (*Executry*) February 1684, commissaries of Edinburgh *contra* commissaries of St. Andrews. --- One having died in the expedition to Darien before he went out of the Scottish seas, the confirmation of his testament in the commissariat of Glasgow, by an executor-creditor, was preferred to another confirmation before the commissaries of Edinburgh, in respect the defunct had left his wife and family in Glasgow, where she lived, prosecuting his former trade of a merchant. Forbes, 22d February 1711, Henry *contra* Glasfells.

THE testament of a soldier dying, without any fixed habitation, in Glasgow, where the regiment he belonged to lay at the time, and had been sixty days before, ought to be confirmed by the commissaries of Edinburgh *tanquam commune forum*; unless the defunct had resided at Glasgow with the regiment forty days immediately preceeding his decease. Forbes, 16th February 1711, Nisbet and Bell *contra* Monro.

CONFIRMATION of the defunct's testament must be in that jurisdiction within which his domicile is, and not where he happens occasionally to be at the time of his decease. Upon which footing, a confirmation in the commissariat of Glasgow was found a sufficient title in a pursuit against one of the defunct's debtors, tho' the defunct, who was a single man, and had no family, had, about twenty days before his death, retired himself with his all, into a place within another commissariat: Which short space, the Lords did not think sufficient to fix him to have *focum & larem* in his new place. Fountainhall, 22d December 1692, Kincaid *contra* Anderson.

F R A U D.

A VASSAL being denounced by his superior for not payment of the feu-duty, and paying it the day after, and taking a common discharge, the superior having concealed the denunciation from him; the vassal insisting in a reduction of the horning upon the above reason, the same was found relevant, in so far as concerned the superior, *ratione doli & fraudis suæ*. Spotiswood, (*Horning*) ult. November, Durie, 1st December 1629, Kincaid *contra* Lauder. --- A minor's curators having transacted a Lady's jointure of 2500 merks *per annum* for 13000 merks, she having unknown to them a cancer in her breast, and dying a few months thereafter; the Lords found this qualification of fraud and circumvention not relevant to reduce the bond, especially they

Fraudulent concealment.

they having homologated the same for some years, by paying annual-rents. Fountainhall, 1st July 1687, Kennedy *contra* Murray and others. ---- A party hearing, that the privy-council was to sink the rate of a piece of coin, and having offered his creditor payment of that money the night before the proclamation, at the current high rate; and upon his refusal taking instruments, and thereupon suspending: The Lords considering, that the design of promulgating these acts was to certiorate the lieges, so that if they knew before, this was sufficient to make the offer fraudulent; they therefore found, That the creditor was not bound to accept, considering the debtor's private knowledge and fraudulent design. Fountainhall, 5th June 1696, Wood *contra* Baird.

Falsc allegation.

It was sustained as a sufficient qualification of circumvention to reduce a bond granted to a merchant, who had furnished some money at Venice, that there was no agreement before hand, wherein the merchant might take any rate he could get; but after the money was furnished, the defender had fraudulently affirmed to the pursuer, that the exchange to Venice was higher than to France, tho' he knew the contrary at the time, and that the bond was drawn up accordingly. Stair, 19th January 1671, Dickson *contra* Graham. ---- An heritor having solemnly affirmed to his tacksmen at setting the lands, that there was paid by the preceeding tenants, for each acre a great deal more than really was paid, and thereby induced him to take it at a very exorbitant rate, whereby he was lesed *ultra dimidium*, yet continued to possess two years before he complained; the Lords found the alledgeance of circumvention and fraud, both *in consilio* and *in eventu*, not sufficient to reduce the tack, and that the tenant should have informed himself better what was the true rent, and not have relied on the setter's assertion, and ought to have tried the quality of the ground, and his eye being his merchant, he had none to blame but himself, especially now that he had acquiesced two years. Fountainhall, 6th December 1698, Kinnaid *contra* Ld. Dean younger. ---- A bond of L. 5000 granted for the balance of agent accompts, and also a bond of pension to the agent for life, being challenged by reduction, at the instance of the granter's heir, upon this footing, That the accompts were false and extravagant, many gross articles being stated never given out. It was answered, That these accompts being ratified and approved of by the defunct, cannot now be challenged by his heir, seeing facility is not alledged. Replied, Subscribing or corroborating of accompts bars all challenge with respect to articles presum'd to fall within the obligant's knowledge; but can signify nothing with respect to articles alledged advanced or given out by the agent, and acquiesced in upon his sole faith; for if these afterwards be redargued and found false, the bond of corroboration, which evidently goes upon the supposition, that the accompts were just and true, will never support such articles; and if the pursuer prevail in the proof, the consequence must be not only to restrict the bond to the just balance, but also to void the bond of pension *in totum*, which goes upon the narrative of good and faithful service. The Lords, before answer, allowed both parties a proof, with regard to the verity and reasonableness of the accompts. 24th July 1735, Sir George Maxwell of Orchardtoun *contra* Edward Cutler.

AN assigney to a bond granted by one brother to another, pursuing for payment, the debtor produced a discharge by the cedent, of the same date and witnesses with the bond; this was presumed to be done *dolose*, in order to gain credit, unless the debtor could condescend upon some reasonable cause of granting the bond, and taking a discharge thereof at the same time. Stair, 4th December 1665, Thomson *contra* Henderson. --- It was found a fraudulent contrivance betwixt a father and son, that at the time of the son's contract of marriage he promised to discharge the provisions due to him by the contract, and that accordingly a discharge was granted before the marriage, and after the contract, and renewed after the marriage, without any satisfaction; and this at the instance of the son's creditors, who had contracted with him *bona fide*, upon their knowledge of the contract of marriage. Stair, 21st January 1680, Caddel *contra* Raith. --- A note or ticket being indorsed for an onerous cause, and, upon the indorsee's pursuit, the debtor founding his exception upon compensation, he having a note for the equivalent sum from the indorser, dated only the day before the note pursued for; the Lords looked upon this as a contrivance betwixt the defender and indorser, in order to furnish the indorser credit, and therefore repelled the compensation in this case. Fountainhall, Forbes, 11th June 1708, Bundy *contra* Kennedy.

Granting a bond, and taking a discharge thereof of the same date.

A GENTLEMAN being abroad, and having no children, two of his nearest relations, while he was yet alive, agreed betwixt themselves privately, that if the estate was disposed to either of them, the other should have a certain share; and the gentleman having thereafter disposed his estate to one of them, with a power to alter, the disponent sent his son to Denmark, where the disponent was, upon which the former disposition was recalled, and a new disposition granted in favours of the son: In a process, after the gentleman's death, to fulfil the contract, it was objected, The disposition was not in favours of the defender, and so the condition of the contract did not obtain. The Lords found the reply relevant, That the defender sent his son with the disposition to Denmark, and that the defunct altered the same there, to infer fraud, to evite performance of the contract. Stair, 15th July 1681, Campbell *contra* Moir. --- An heir of line having entered into a contract with a remoter relation, to divide equally whatever means should fall to either through the death of their relation; which contract also contain'd a submission of what differences might arise, to an arbiter named, to whom, for his pains, they granted a bond for part of the said means, which contract and bond were ratified by both parties the day after the predecessor's decease: The heir at law, to whom the estate was now devolved, raised a reduction of the contract upon fraud and circumvention, against the arbiter, who had now taken right to the contract, qualifying, *1mo*, That he was imposed upon by the arbiter, under pretence of friendship, to go into a most unequal bargain with one who had not the smallest expectation of succeeding, the arbiter falsely representing, that the defunct had a great inclination to make the other party his heir. *2do*, That he had made them take an oath of Secrecy. *3tio*, Endeavoured to bribe the pursuer's friends to desert him. The Lords found the agreement and bond were elicited by fraud and circumvention, and that the same fraud and cir-

Under-hand dealing.

cumvention was continued in impetrating the ratification, while the pursuer was yet ignorant that the succession was devolved to him, and therefore reduced the contract, bond, and ratification. *Harcus, (Fraud)*

November 1682, *Ballantyne contra Neilson*.-----A husband and wife, during the marriage, having made two mutual onerous deeds in favours of one another, to this import, that the survivor should bruik all, it was objected to the wife by the representatives of the predeceasing husband, That she having privately, without the knowledge of her husband, executed a revocation of the deed granted by her, this, tho' not effectual in law to revoke an onerous deed, was yet an intended fraud, sufficient to bar her from reaping any benefit of the deed granted by her husband in her favours; the Lords notwithstanding repelled the objection. 13th July 1733, *Shearer contra Somervell*.

Latent deed
presumed fraudulent, in order to protect against creditors.

IN a reduction of a bond of provision, at the instance of a creditor, whose debt was posterior to the delivery, the Lords refused to sustain the reasons of reduction upon the act 1621, but ordained the pursuer to condescend if he had any particular ground of challenge upon the head of fraud. *Stair, Gosford, 21st January 1669, creditors of Pollock contra Pollock*. And the pursuer having condescended, 1mo, That the son was forisfamiliar, and sufficiently provided before. 2do, That the term of payment was after the father's death, bearing no annual-rent in the *interim*, and that it remained latent betwixt the parties, without any thing following upon it. 3tio, That the debts were all contracted a very little after the bond. The Lords found these circumstances relevant to infer a presumptive fraud and contrivance betwixt the father and son to disappoint the creditors, and therefore reduced the same, and preferred the creditors, and even the relict, in so far as she was an onerous creditor, but not for any posterior gratuitous provision to her or her children. *Stair, Gosford, 12th February 1669, inter eosdem*. ---A disposition by a merchant to his infant son of his whole estate, without a reserved liferent or power to burden, was found fraudulent, and presumed done of purpose to cheat his correspondents, being foreign merchants, who had been in a course of trading with him before the alienation, and continued to deal with him thereafter upon the faith and security that he was still proprietor, and their debts, tho' posterior to the disposition, found to affect the said estate; and it was not respected, that the son's sasine was in the publick register, which strangers are not bound to take notice of or know. *Stair, 2d July 1673, Street and Jackson contra Mason*. ---A similar reduction, upon the head of fraud, was sustained. *Stair, 4th December 1673, Reid contra Reid* --- In a reduction of a disposition of land, granted by a nephew to an uncle, at the instance of a creditor of the disposer's, whose debt was contracted after the disposition, upon presumed fraud, that the disposition being betwixt conjunct persons, did not prove its onerous cause, but must be presumed granted to protect the subject from the disposer's debts, and and kept latent to ensnare creditors. Answered, At the time of the disposition the disposer had no dealing with the pursuer, nor for several years thereafter; and therefore it can never be said the disposition was granted in defraud of him. The Lords assilzied from the reduction. *Fountainhall, 10th February 1709, Mr. Christian contra Monteith*.-----A person granted a bond to one of his friends, payable, in
case

case the granter died without heirs of his body, and redeemable by himself for a peny. Bonds of this nature are presumed to be fraudulent, granted in the view to disappoint creditors, and therefore was found reducible *ex capite doli*, at the instance of posterior onerous creditors. Stair, Dirleton, Gosford, 24th January 1677, Blair *contra* Wilson. --- A party having assigned a bond to his daughters in implement of his contract of marriage, and thereafter contracting debt; in a reduction at the creditors instance, the Lords preferred the daughters, the granter having been very rich when the assignation was made, and so there was no fraud, especially as to future creditors; nor did Street and Mason's case in 1673 meet here, for there the *concilium fraudis* was evident by a current tract of correspondence. Fountainhall, 29th February 1684, Paul *contra* Davidson. --- It being objected by creditors against a bond of provision to children, That it was a latent deed, never known till the father broke; besides, that it was not supported by the father's contract of marriage, in which the provision was in favours of heirs, and only payable after his decease; whereas the bond adds a considerable sum more, is to the children, and made payable at their age of twenty one, and so wanted an onerous cause, tho' the children offered to prove delivery, and the creditors debts were all long posterior to that bond; yet the Lords decerned in the reduction of the bond, and preferred the creditors to the children. Fountainhall, 10th February 1688, creditors of Robertson *contra* his children.

A PERSON who knew himself insolvent having bought some goods, which, after delivery, were arrested by his creditors; the Lords reduced the contract as fraudulent, and preferred the feller to the arresters; for it is against equity that creditors should gain by their debtors fraud, to the prejudice of others, *potior debet esse conditio ejus qui certat de damno evitando, quam ejus qui certat de lucro acquirendo*. Stair, Fountainhall, 22d December 1680, Prince *contra* Pallat. --- The like. Dalrymple, Bruce, 18th January 1715, Main *contra* Maxwell. --- In October 1734, a bargain was made betwixt Sir John Inglis of Cramond and Joseph Cave, for Sir John's barley of that crop; in pursuance of which bargain Sir John sent his barley to Mr. Cave by parcels, in the months of November, December, and beginning of January thereafter. Mr. Cave's circumstances going into disorder, he made a disposition of his effects to his creditors upon the 21st January 1735; whereupon Sir John insisted in a process, claiming the subject, upon this *medium*, That the contract was fraudulent upon the part of the purchaser, who was at that time insolvent, and incapable to pay the price, and therefore was null, *quia dolus dedit causam contractui*; and the property was never transferred. Appearance being made for the creditors, it was answered for them, Fraud is not to be presumed, and a merchant, tho' at many periods, his debts may exceed his effects, yet his continuing to trade, is not *eo ipso* fraudulent, because he may entertain reasonable hopes by carrying on a profitable business, to emerge out of his difficulties, and to do justice to every one of his creditors. The Lords found it not relevant to reduce the bargain for the purchase of barley in October 1734; that it appeared by the common debtor's books, that at the time of the bargain he was insolvent, since he continued his trade till the 21st January thereafter, and his bankruptcy was

One purchasing goods, knowing himself to be insolvent.

not discovered till that time. 16th June 1736. The pursuer there-
 after insisted, That the date of the delivery is the only period that is to
 be considered as to this question; for supposing the contract fair, yet if
 at the time of delivery, by which the property is transferred, the bank-
 rupt is thinking *cedere foro*, and of giving up his effects to his credi-
 tors, it is fraudulent in him to receive the subject sold, when he has
 no prospect of doing justice by paying the price. The Lords found,
 The time of delivery must be the rule. 8th December 1736. ----
 The question next occurred, What period ought to be fixed before the
cessio, at which it may be presumed the bankrupt was meditating *ce-
 dere foro*, after which all purchases made, or delivery accepted by him
 must be understood fraudulent? The pursuer insisted, That it ought
 to be sixty days, by analogy of the act 1696. The defender insisted,
 That it could not go beyond the bounds of three days, building upon
 the authority of several foreign lawiers, particularly Simon Van Lewen,
 in the following words: *E contra tamen, nec fides de prætio habita ven-
 ditori obstat, quo minus rei suæ dominus maneat, & adhuc rei suæ
 vindicationem instituere possit; si scilicet emptor dolo se biduo aut triduo
 antequam foro cedat emendo merces cum venditore contraxit, ut eum
 fallet.* The Lords found, That the presumptive fraud must be con-
 fined to three days before the *cessio bonorum*; and therefore found the
 pursuer preferable as to any barley delivered during that period. 8th
 December 1736, Sir John Inglis of Cramond *contra* royal bank.

Facility and
 lesion without
 condescending
 upon acts of
 circumvention.

DAVID Smith, as heir, and having right by disposition, raises a re-
 duction of a right, made by the deceas'd Liddel of Craigannet of his
 lands to Mr. Francis Napier his uncle, on these qualifications; That he
 was a simple youth, and denuded himself of the fee of his estate, with-
 out power to contract a fixpence of debt, tho' it had been to ransom
 him from the Turks, only redeemable by his heir-male, and that it
 was not read to him at the time; and when he scrupled to sign it,
 Mr. Francis bid him do it, for it contained nothing that did hurt or
 prejudice him: Whereby it appears, the tenor of the disposition has
 not been understood by him. Answered, These qualifications have no-
 thing of relevancy in them to infer the least suspicion of fraud, circum-
 vention or extortion; for tho' a wise man would not have given such
 a right, yet the Lords are not curators to all who in this manner dis-
 pose upon their rights; and tho' it was not then read, it might have
 been read by him before; and Mr. Francis, in telling him it wrong'd
 him not, made no lie; for tho' it wrong'd his heirs, yet it did not
 prejudice himself. If he had disguised the thing, and called it a factory
 or an assignation to the rents, this might have imported *dole*; but no-
 thing of this is pretended. Some of the Lords were for expiscation
 before answer of the youth's facility, and any acts by which he seem'd
 to have been imposed upon; but the plurality thought it hard to put
 the parties to the expence of a tedious probation upon so weak pre-
 sumptions, and probabilities of being over-reached; and therefore af-
 foilzied from the reduction, and qualifications of fraud condescended
 upon, as no way relevant. Fountainhall, 23d December 1697, Smith
contra Napier. --- In the reduction of a contract, whereby the pursuer,
 a very weak and facile man, was enormly lesed; the Lords refused to
 sustain the reduction, because there were no such qualifications of weak-
 ness

ness in the pursuer proved as to disable him to contract, nor no fraud nor circumvention proved on the part of the defender. 7th February 1729, Gordon *contra* Ross. --- A creditor having elicited from his debtor, (who was proved to be a weak and facile man) at different times, dispositions of valuable subjects, in security and payment of trifling patch'd up claims, and at last a total discharge of the reversion for an inconsiderable sum, the debtor at that time being much pinch'd in his circumstances; the Lords reduced the discharge upon fraud and circumvention, which was principally presumed from the facility and weakness of the granter, join'd with the very great inequality of the bargain. 13th February 1729, Maitland *contra* Fergusson. --- A simple young man having been inticed to renounce an unexceptionable infestment of annualrent, upon getting the debtor's personal bond for a lesser sum, to which several rigorous clauses were adjected; the Lords, notwithstanding, refused to annul the bargain, there being no evidence of circumvention but what appeared *ex facie* of the deed; but rejected the rigorous clauses, and reduced the whole *ad arbitrium boni viri*. Fountainhall, 27th November 1696, Alison *contra* Bothwell.

THE Lords refused to find circumvention, and sustained an alienation of lands, tho' clothed with the circumstances following, *viz.* ^{Disposition elicited by a curator upon majority.} 1mo, It was a contract of wadset betwixt a person only six months major, and his uncle, who had been his curator *sine quo non*. 2do, At payment of the sum agreed on, it was stipulated in the contract, That if within six years thereafter another smaller sum were paid by the uncle, the lands should be his irredeemably. 3tio, The contract bore no clause giving power to the nephew to redeem the lands. 4to, The plenishing of the house, &c. were therein also assigned *in cumulo*. 5to, By another writ of that date, the nephew grants the uncle a right to fish and draw upon his lands adjacent to the wadset-lands, which made the fishing useless to the granter, yet bore to last as long as the uncle's right to the wadset-land. 6to, The contract was never read by the nephew, nor by the witnesses. 7mo, It was made *ante redditas rationes curatelæ*. Durie, 4th July 1635, Ld. Monimusk *contra* Ld. Leslie. --- It was found to be fraudulent and unwarrantable, for a curator to elicit a disposition from one that had been his minor, and just enter'd majority, before his accompts were given up and cleared. Here it was alledged, That the disponent was of a weak capacity, and the onerous cause far within the value. Stair, Gosford, 18th February 1669, Trinch *contra* Watson.

THE following qualifications of fraud and circumvention, were found sufficient to cut down a disposition granted by a woman to her brother-in-law, of her whole substance, not even reserving a liferent. ^{Deed not read at subscribing.} 1mo, That the woman was in a dying condition when she granted the disposition, tho' she afterwards reconvalesced. 2do, That it was the disponent, and not the pursuer, who employed the writer to draw the deed. 3tio, That it was not read to her at subscribing. Stair, 5th December 1672, Galloway *contra* Duff.

FUNERAL CHARGES.

IN a purfuit for an apothecary's accompt againft a gentleman, it being partly made up of articles for eviscerating his lady, for a fcarcloth and odours thereto; the Lords took notice, that the price libelled, amounting to L. 224, was moft exorbitant, and thought it unfit, that by their decifion they fhould countenance or fuftain any fuch extortion, (tho' it be the ufual practice of wrights for coffins, and all others who furnifh any thing to burials) in regard that friends are unwilling to be heard at fuch times; they therefore ordained the article, huddled up *in cumulo*, to be divided into particular articles, that the fame might be modified, and the lieges not abufed. Fountainhall, 5th June 1697, Borthwick *contra* Ramsay.

In a procefs betwixt a lady and her husband's heir, fhe craving allowance out of her intromiffions with the executry, of the funeral charges of her faid husband, who was a perfon of diftinction, and an officer of ftate, which fhe had paid to the furnifhers, and taken affignation from them, and which accompts the heir alledged were extravagant; the Lords allowed only decent and neceffary expences. Fountainhall, Forbes, 17th November, and 14th December 1709, Hamilton *contra* Lord and Lady Ormifton.

GENERAL ASSIGNATION.

What understood a general assignment.

THE laird of Grant having made a difpofition *omnium bonorum* to his lady, in cafe of her furvivance, *rents, mails, casualties, &c.* with a fpecial clause, *together with what fhall be due and refting at my deceafe of the yearly annuity of L. 200 Sterling money, payable to me by brigadier Grant*, it was contended for the lady, That as to the remains of the L. 200 annuity refting at her husband's death, her affignation was fpecial. The Lords found, That even as to this clause the difpofition was general, in terms of the act 26, parl. 1690, and therefore needed confirmation. 23d July 1717, Lady Grant and Mrs. Brodie competing. --- Affignation to a creditor of as much *of the firft and readieft of the rents of his lands that fhould happen to be due to him the time of his deceafe, as would fatisfy and pay the fum of L. 1400 Sterling*, was found to be a general affignation, and that it would give no preference without a confirmation; and therefore an executor-creditor was preferred in a competition. Home, January 1723, Gray *contra* Callender.

General legacy.

A LEGACY of 1000 merks out of the refts in the tenants hands, is not a fpecial legacy, for which the legatar himfelf can purfue, and therefore has only action againft the executor in common form. Stair, 21ft January 1673, Forbes *contra* Forbes.

A MAN

A MAN having granted to his wife, by way of augmentation of her jointure, an affignation, running in these terms, *viz. To all goods and gear, debts and sums, lands and heritages*; the Lords found, (tho' there was no children of the marriage) That such a disposition or affignation did only carry right of the moveables, and the liferent of the heritage. Home, February 1687, Fairholm *contra* Kirkwood.

---- Found, That *nomina debitorum* were comprehended under a legacy of goods and gear. Fountainhall, Marcus, (*Legacies*) 22d November 1683, Oswal *contra* Mortimer. ---- A defunct having granted a disposition to his heirs of tailzie of *all debts, bonds, obligations, and sums of money, contained in an inventory*, and the question betwixt him and the executor being, Whether these words were taxative or demonstrative, so as to reach and carry the money lying beside the defunct the time of his decease? The Lords found, That it did not extend thereto, and decerned in favour of the executor. Fountainhall, 19th July 1688, Scot and his Lady *contra* Ld. Dirleton. ---- In the same cause it being debated, Whether the rents in the tenants hands bygone before the predecessor's death, did belong to the executor? who alledged this ground for the affirmative, That in a former disposition to the heir of tailzie the defunct had expressed this, and having omitted it in this last disposition, it must be presumed to have been omitted *de industria*: Yet the Lords found, That these rents fell under the general word of *debts*, and so belonged to the heir of tailzie. Fountainhall, 27th July 1688, *inter eosd.* ----- By contract of marriage the husband became bound to *secure all lands, heretages, annualrents, wadsets, sums of money, and other goods and gear whatsoever, in favours of his wife in liferent*; and by another clause it was provided, That the survivor should have the liferent of *all free goods and gear whatsoever*, and the survivor is obliged to make good and thankful payment of the equal half of all goods and gear whatsoever to such persons as the first deceiver should leave the same to in testament or latter-will, and that at the decease of the longest liver; the wife dying first, without heirs of the marriage, assigns the benefit of the contract to her brother; the Lords found, That the words *goods and gear* were not to be understood in the restricted meaning, but that the same did extend, as well to bonds bearing annualrent and other debts, as to *corpora* or other species of moveables. Dalrymple, Fountainhall, 1st December 1699, Henderfon *contra* Beir and Forest. ---- A woman having, in her contract of marriage, disposed to her husband, his heirs and assignies, her whole goods and gear, moveable and immoveable, debts and sums of money, and two tenements of land, with power to her, in case of her surviving him without children of the marriage, to dispose upon the half of the goods, gear, sums of money, and others contracted on her part; the Lords found the clause did import, That in the event aforesaid, a half of the heritable as well as moveable subjects disposed should return to her. Forbes, 19th June 1711, Linklatter *contra* Boswell.

A WIDOW inest in a liferent-locality, "sold the same, together with all right, title, interest whatever, that she could any way ask, claim or pretend in and to the foresaid local lands:" This was not found to comprehend a claim of recompence, she had against her husband's heirs by her consenting to the preference of a creditor, who drew

the rents of her local lands for several years. 29th November 1728, competition betwixt Trail of Sabae and Moodie of Melfetter.

AN assignation, *mortis causa*, executed in *liege poustie*, containing an exact list of all the moveable bonds and bills, with a general clause adjected, of *goods and gear, debts and sums of money, household furniture, lying money, gold, silver, coined and uncoined, and others whatsoever*, was not found to comprehend an heritable bond due to the defunct, but the same was found to belong to the heir. 6th January 1736, Mochrie *contra* Lin.

A BARONY being disposed, with the mill thereof, and the multures used and wont, the multures of another barony, belonging to the same disposer, were not understood to be disposed, tho' the tenants had been in use of coming to that mill. Stair, 11th December 1666, Earl of Cassils *contra* tenants of Dalmorton.---- A thirlage was found constituted by infestment of a mill flowing from an ecclesiastick person, *cum astrictis multuris omnium & singularum terrarum de Oldlistoun*, being before the defender's original right to his lands, tho' it was alledged for him, That his were the mains or dominical lands of the barony, which could not be understood thirled by this general clause, more especially that it cannot be proved these lands paid astricted multures before, or since the constitution of the pursuer's thirlage. Stair, 29th July 1673, Dundas *contra* Skene.

If a general assignation will carry subjects the grant-er knew not of.

A GENERAL disposition of moveables was found not to comprehend a bond privately granted to the disposer's wife, in order to procure her assistance in influencing the husband to settle his estate upon the granter of the bond, because the disposition, tho' general, could not be supposed to comprehend a subject the granter knew not of, tho' it fell to him, *jure mariti*, and therefore the defunct's nearest of kin was preferred to the disponent. Fountainhall, 25th February 1697, Morison of Prestongrange *contra* Lady Harden.

GENERAL assignation derogates not from a prior special destination. See Presumption.

GENERAL DISCHARGES and RENOUNCIATIONS.

General clause in discharges presumed to comprehend personal debts.

A GENERAL clause, discharging all action for payment of any debt or sum of money resting by contract, decreet, bond, or otherwise, tho' subjoined to a discharge of particular small sums, mentioned *nominatim*, will be sufficient to defend against any process founded on a prior bond or obligation, tho' it were for a much larger sum, than any of these mentioned in the discharge. Durie, 24th February 1636, Lawson *contra* Ld. Ardkinlafs.---- A general discharge granted to a vassal, tho' referring to a special accompt, was presumed to include the feu-duties, for which he was personally liable, tho' not mentioned in the accompt, but not the feu-duties of years before the vassal's

vassal's right, for which no action lay but a poinding of the ground. Fountainhall, 12th, Stair, 13th July 1678, Prestongrange *contra* Waird.---- An old bond, near prescribed, being pursued on by an assigney, and two general discharges being granted after the bond, mentioning farms of lands, and then subjoining a general clause of all accompts, reckonings, borrowings, &c. or any thing else betwixt the parties, with an exception of another sum, smaller than that now pursued for; the Lords found these two general discharges so comprehensive as to extend even to the bond now pursued for, tho' they did not mention it. Fountainhall, 14th November 1695, Forbes *contra* Gordon.---- A discharge being granted of a sum, and a general clause subjoined, discharging all other demands; the Lords found, That the clause likewise comprehended a sum that was eight times greater than the sum expressly discharged, tho' the greater sum was not named in the discharge. Fountainhall, Forbes, 29th June 1705, Chapel *contra* Guydet.---- A general discharge in a decret-arbitral, was found to comprehend a process of spuilzie. Hope, (*Payment*) 3d July 1613, Lady Balmachewn *contra* Waddel.---- Against a very considerable claim for debursemments, the defence was laid upon a decret-arbitral, ordaining the parties to discharge one another of all accompts and reckonings, &c. Answered, The decret proceeded on special claims; and it was offered to be proved, That this article was neither *actum* nor *tractatum* at the time. The Lords thought it dangerous to loose decreets-arbitral and general discharges by such expiscations, and therefore sustained the defence, and would not admit of a contrary proof. Fountainhall, 15th January 1696, Carnegie of Pittarrow *contra* Earl of Southesk.---- Parties who had submitted their differences concerning a certain estate, were decerned by decret-arbitral to grant general discharges of all actions or claims competent to each other, the general discharge was understood to extend no further than concerned the particulars of the said estate. Forbes MS. 30th July 1714, Colonel Erskine *contra* Lady Mary Cochrane.

A GENERAL discharge of all sums of money, compts and reckonings, presum'd to comprehend an heritable bond. Haddington, 26th February 1612, Ker *contra* Ld. Merfintoun.----- Not heritable debts.
Found, That a general discharge could not extend to a comprising. Fountainhall, 24th July 1678, Ld. Ardblair *contra* Husband.-----
Found, That a general discharge, containing an exception of one particular, (which confirms the generality *in casibus non exceptis*) could not extend to take away an obligation, to procure a right to a comprising, because general discharges are never extended to heritable rights. Stair, Fountainhall, 19th November 1680, Dalgarno *contra* Ld. Tolquhoun.---- A general discharge being granted of all debts and decreets, the Lords found, That it did not extend to a decret of adjudication, where there was no instruction or document, that the debt contained in the said adjudication was communed upon or accompted for at granting the general discharge. Bruce MS. 27th June 1716, Mitchel *contra* Sinclair.

A GENERAL discharge was not extended to a sum, for which the granter of the discharge was cautioner, and was charged, unless, before Nor a claim for relief.

the general discharge, he had made payment. Stair, 23d January 1678, Campbell *contra* Napier. ---- A creditor having given a general discharge to his debtor, for whom he was then cautioner, but not distressed, it was contended, That the general discharge did also cut off the relief of the cautionry, seeing the debtor was in effect bankrupt, and had sold his lands to pay his debts, which far exceeded the price, and yet there was no reservation of cautionry in the discharge; the Lords found the general discharge did not extend to cautionry and relief, whereon the granter was not distressed the time of the discharge. Marcus, (*Discharges*)

March 1682, Oliphant *contra* the Lady Newton, ---- A general discharge being granted on the back of a bond, not only discharging that particular sum, but all preceeding demands; the Lords found, That such a general clause could not extend to a bond of relief, unless it were proved, that it was *deductum in computo*, and expressly treated and communioned upon at the time. Fountainhall, 12th December 1695, Wood *contra* Gordon. ---- A legacy left of a sum, with liberation of all debts due to the defunct by the legatary, was found to include an action of relief for cautionry, tho' the debt was not then paid by the testator; only in a codicil subjoin'd to the testament, he appointed the same to be paid out of his own proper estate, without declaring that the executor should have any action of relief. Gosford, 2d January 1674, Douglas *contra* Hay.

Nor a right
of reversion.

A DISCHARGE by the granter of a wadset of all sums, for all lands, was found not to take away the reversion, unless it were special, but that it comprehends all intromission with the duties of the lands wadset. Gosford, 21st January 1669, Keir *contra* Burn. ---- A discharge of a contract, discharging sums of money, with this general clause, *And all other points, &c.* was found not to extend to a reversion contained in the said contract, altho' there was no other point to which the clause could refer. Sinclair, *ult.* July 1546, Ld. Keir *contra* Marjoribanks. ---- The like. Sinclair, 1577, Somervell *contra* Ld. Cambusnetham.

Nor a back-
tack.

THERE being a clause in a contract of wadset, That after redemption, the wadsetter should be liferent tacksmen of the lands, and he having accordingly, upon requisition, renounced and overgiven in general; the Lords found, That this general renunciation did not extend to that clause. Maitland, 5th December 1566, Ld. Symington *contra* Weir.

Nor a life-
rent provision.

FOUND, That a discharge by a woman *stante matrimonio* of a moveable sum, and generally of the contract of marriage, cannot be extended to that clause of the contract, whereby the husband and cautioner were obliged to employ the sum upon land, or annualrent, to the woman in conjunct-fee. Hope (*Husband*) 17th June 1620, Swan *contra* Forrest. ---- A woman having made a disposition *omnium bonorum* to her husband, and at her death left her wearing cloths to her aunt, who took decreet against the husband for the same, and thereafter granted a discharge to him, narrating the decreet, and containing a general clause of all she could ask or crave from him; the Lords found, That

That the discharge concerned the decret only, and did not cut off the granter from a claim of an annuity, contained in an obligation granted to her by the defunct antecedent to the marriage. Forbes, 24th July 1706, Weemyfs and White *contra* Murray. --- In a contract of marriage, the husband being bound to infest his wife in a water-passage upon Forth, with the emoluments, &c. as a part of her jointure, after his death, she pursuing for implement of the same, the heir founded his defence upon a general discharge; in which, after narrating, that she had received payment from the heir, of the mournings, funerals, alimient of the family, &c. and specially of the bygone annualrents of a sum provided to her in liferent, there is subjoined the common clause of a general discharge, excepting only the yearly annualrents in time coming. The Lords sustained the defence founded upon the general discharge, unless the pursuer would prove by the defender's oath, that at granting the general discharge it was communed upon, that the said water-passage should be reserved. Bruce MS. 26th July 1716, Dundas *contra* Dundas.

A GENERAL clause in a bond, not to trouble a man by any manner of action, was found not to hinder the granter to pursue the other in an improbation; because that action cannot be renounced by a general clause, but must be expressly mentioned. Haddington, 24th February 1607, Calderwood *contra* Ld. Ley. Nor an action of improbation.

THE Lords found warrandice in the assignation to a bond incurred by the creditors granting a general discharge to the debtor, bearing receipt and payment of all bonds, tickets, &c. a year after delivery of the assignation, but before it was intimated. Forbes MS. 1st, 24th November 1713, Alexander *contra* Agnew. --- A general discharge of all debts, sums of money, goods and gear whatsoever, bearing certain onerous causes and weighty considerations, and containing absolute warrandice, was found not to comprehend a bond assigned *ab ante*, tho' not intimated; 1mo, Because the granter could not be presumed to be discharging a bond, that he was not entitled to take payment of, especially when he could not know but it might be intimated. 2do, The general discharge does not import payment of the bond, without which the debtor must be liable to the assigney, tho' the bond *de facto* were discharged. 14th February 1736, Lady Logan *contra* Affleck of Edinburgh. General discharge, if it is presumed to comprehend a debt *ab ante* assigned?

FOUND, That a discharge granted of a special sum contracted for tocher to the granter's sister, tho containing a general clause, discharging him of all sums whatsoever which he might ask or crave of him, wherein he was obliged to her, either in her own name, or in any other person's name to her behoof, did not extend to a sum, which, by a clause in the said contract, belonged to her as surviving another sister, whose tocher was therein declared to accresce to her, seeing the same was not specially discharged; that sum being a debt as principally owing as the tocher, and the general clause in the discharge not extending to any sums which might thereafter fall to her by her sister's decease, nor any such thing communed upon at granting. Durie, 14th February 1633, Haliburton *contra* Hunter. --- A general discharge If presumed to comprehend a debt, wherein the granter is substitute only?

discharge of all bonds of provision, was found not to include a provision by substitution, whereof there was only an apparency, *Et de quo non fuit cogitatum*. Gosford, 27th January 1670, Innes *contra* Alexander. --- For a certain sum to be paid yearly, one having renounced and disposed *his portion natural, and bairns part of gear, and all right he had to a certain estate, or any part thereof*; this general renunciation was not extended to future rights, or hope of succession; and therefore not to the renouncer's right, as a substitute in a tailzie. Stair, 27th July 1671, Baillie *contra* Baillie.

If presum'd
to comprehend
legal provisi-
ons?

A WIDOW, at contracting of marriage with her second husband, having given her future spouse a free discharge of any thing could belong to her as relict, in case she survived him, by law or any other manner of way whatsoever, and she herself predeceasing; in a process at the instance of her executors against the husband for her third, the case of his survivance not being mentioned in the discharge, the Lords extended the said discharge to comprehend both cases. Fountainhall, 12th July 1701, executors of Boyes *contra* Sandilands. --- A father granted bond of provision to his younger children, whereby he obliged himself and his heir to pay them; but declared, that his executors should not be burdened therewith; and declared also, *that the provisions should be in full satisfaction to the bairns of all portion natural, and bairns part of gear that they could claim from his heirs and successors*. The father having died without testament, it was found, *That seeing this clause did not bear in satisfaction of all they might claim from the father's heirs and successors, but only of all bairns part and portion natural, (in other words the legitim)* which would not exclude them from the dead's part, nor from being executors; that therefore, *qua* executors, they must have the moveables over and above the bond of provision. Stair, 13th July 1672, Chisholm *contra* Chisholms. --- The Lords found, That a discharge of all that a party could ask or crave as heir to his father, did not exoner as to what belonged to himself as heir to his grandfather, tho' the father survived and was heir apparent to the said grandfather, but had an estate which he got otherwise. Home, December 1685, Maxwell *contra* Irvine. --- A party having provided his son of a first marriage to some lands, &c. and taken a discharge from him, and thereafter having disposed other lands to his son of the second marriage: In a reduction of this disposition at the instance of the first son, the Lords found, That the sole import of the said discharge on which the defender founded his defence, was to cut off the eldest from the executry and moveables, and was not to be extended to heritage, which is a particular of greater import than that expressed. Fountainhall, 25th December 1702, Gordon *contra* Ross. --- A woman being confirmed executrix as nearest of kin, after her decease the next in blood made up titles by confirmation to some moveable debts omitted out of the inventory of the former testament, and insisted against the debtor for payment. The defence was laid upon a general discharge granted by the husband of the executrix, of all he could ask or crave from the debtor, in virtue of his wife's claim for executry, &c. which must be presumed to include the present claim; and tho' it should be supposed, the husband could not effectually discharge this claim, by reason titles were not made up
in

in his wife's person, yet the same bearing absolute warrandice, must bar the pursuer, who is the husband's representative, and liable to fulfil his deeds. Answered, No presumption that this claim fell under the general discharge, seeing the wife had no title to claim, nor power to discharge. Replied, She had the *jus fundatum* by the right of blood, was confirmed in a part, and a licence to pursue for the remainder; so that, in the outmost rigour of the law, there was nothing wanting but an eik to the testament, which might be done at any time. The Lords sustained the defence upon the general discharge. February 1736, Gray *contra* creditors of Drum.

A FATHER having executed a bond of provision in favours of a younger son, which he kept in his own custody, the same was found not to be comprehended in a general discharge of all clags, claims, &c. granted by the son to his father. Forbes, 16th December 1712, *Monro contra* Monro. If presumed to comprehend an underlivered bond of provision?

GENERAL SUBMISSION.

A GENERAL clause in a submission anent all matters debateable, was found not to extend to matters of greater consequence than these expressed. Haddington, 4th March 1607, Ld. Inchaffray *contra* Oliphant.---- A general submission cannot give the judges power to pronounce upon heritable rights. Hope, (*Arbiter*) 4th March 1612, Paterfon *contra* Ld. of Forret.---- A submission being general of all controversies, questions, sums, &c. and the judges having decreed one party to renounce two heritable rights, the decret was sustained, and the arbiters were not found to have transgressed their powers. Durie, 15th December 1631, Kincaid *contra* Aikenhead.

GENERAL LETTERS.

A MINISTER complaining by bill, that he was refused general letters of horning for his stipend, upon a decret of modification; but there being no decret of locality (which only intitles them to general letters by the act 13th, parl. 1690,) yet the whole teinds of the parish being in the hands of one man as tacksmen, so as no division by a decret of locality seemed needful; the Lords allowed the decret to go out in general terms of tacksmen, heritors, feuers, &c. leaving the application to the messenger, conform to a subscribed roll to be given him by the charger; so that the tacksmen might suspend the charge on the said reason of want of a decret of locality: Only the tacksmen, in that case, must consign, the charge being for a minister's stipend, conform to the act of parliament, unless the charger would discuss upon the bill. Fountainhall, 15th June 1700, Aikman *contra* Cuninghame.

THE Lords sustained a charge upon general letters of horning against the freeholders of a shire, for meeting and stenting themselves for payment of the fees of their commissioner to the parliament, the king's revenue being excepted in the act 13, parl. 1690, *discharging general letters*, and commissioners fees being of the same nature. Forbes, 10th February 1713, Burnet *contra* heritors and freeholders of the shire of Kincardin.

GIFT OF BASTARDY.

Competition. THE last gift of v. g. bastardy, with the first intended declarator, was preferred to a prior gift, tho' having attained possession. Haddington, 7th June 1610, Millar *contra* Stewart.

What it comprehends. AN heritable bond granted to a bastard was found to come under the general gift of bastardy; and therefore the general gift was preferred to a posterior special one, bearing the particular sum. Durie, Auchinleck, (*Heretable Sums*) 9th July 1629, Wallace *contra* Muir.

GIFT OF ESCHEAT.

Formalities of the gift. A GIFT of escheat being procured at court, making no special mention of any horning preceeding, the Lords found that no declarator could pass thereupon, altho' the declarator itself libelled upon a special horning produced, which preceeded the gift, year and day, and altho' there was also no competing donatar. Durie, 20th November 1628, Westoun *contra* Stewart.

PROCESS sustained upon a gift of escheat, tho' not sealed till after execution of the summons of general declarator, seeing the pursuer produced an instrument, requiring the keepers of the privy seal, *debito tempore*, to seal the same. Durie, 17th July 1627, Lyming *contra* Walker.

Gift of single escheat how far extended. FOUND, That notwithstanding the common clause in gifts of single escheat, (of all that shall happen to be acquired) yet the same comprehends no more but the goods and gear belonging to the rebel the time of the denunciation and gift, but not those acquired within year and day after the said gift. Hope, (*Horning*) 25th June 1622, Ld. Caprington *contra* Inglis. --- A gift, bearing all that pertained to the rebel the time of the rebellion, was found to extend to nothing that the said rebel had after the precise time of his denunciation. Durie, *penult.* February 1623, Ld. Effilmonth *contra* Ld. Buckie. Durie, 25th November 1626, Earl Kinghorn *contra* Wood. Durie, 2d February 1627, Somervell *contra* Stirling. --- But where the gift carried all goods which he should acquire after the rebellion, the Lords found, That

That this ought not to be sustained, not even tho' restricted to all goods that he should acquire within a year after the gift. Durie, *penult.* February 1623, *Ld. Effilmonth contra Ld. Buckie.*---But thereafter the Lords found, That such a gift bearing to all he had or should acquire till relaxation, ought to extend to all goods which the rebel had the time of the rebellion, or what he should acquire within a year after the date of the gift, he remaining unrelaxed all that time; to which space they found, that the gifts of that tenor could be extended at furthest, otherwise it would confound gifts of single and liferent-escheats. Durie, 25th November 1626, *Earl Kinghorn contra Wood.*-----The like. Durie, 10th February 1642, *Mowat contra Keith.* Stair, 2d July 1669, *Bow contra Campbell.*-----This clause in the gift of an escheat, *All that is due the time of the burning, or that the rebel should acquire at any time thereafter,* was found only to be stile, and ineffectual beyond what was due to the rebel the time of the gift, and year and day thereafter; and what is beyond that, must be compassed by a second gift; and found the said alledgeance competent, not only to a second donatary, but also to the debtor, being exclusive of the first donatary's title. Falconer, *Fountainhall*, 23d January, Home, March 1684, *Neilson contra Kennedy.* Falconer, 9th December 1685, *M'Intosh and Somervell contra Primrose.*-----A gift of single escheat, bearing not only what pertained to the rebel at the rebellion, but what had fallen or should fall, accrue and belong to him during his remaining at the horn, was found to carry right to a debt falling due to him many years after the rebellion. Forbes, 8th, *Fountainhall*, 9th February 1712, *Lord Min-to contra Marishal.*

FOUND, That liferent-escheat can only be extended to lands and Heritages pertaining to the rebel the time of the gift. Hope (*Horning*) 25th June 1622, *Dickson contra Lord Borthwick.*-----Found, That a gift of liferent-escheat, bearing all that belonged to the rebel the time of the denunciation, cannot be further extended, and that it cannot comprehend, either the subsequent crop, or any goods and gear acquired after the denunciation, and before the gift. Hope, (*Horning*) 7th February 1623, *Buckie contra Davidson.*-----A gift of liferent-escheat, whether it reaches casualties arising after the date of the gift, in competition with a new gift, debated. Spotiswood, (*Escheat*) 8th March 1628, *Douglas contra Ld. Wedderburn.*

Gift of life-rent-escheat, how far extended?

THE first gift, with the first intended action, was preferred to the second gift, tho' clothed with natural possession. Colvil, December 1588, *Graham contra Graham.* Colvil, January 1590, *Ld. Coluthie contra Dundas.* Stair, 6th December 1662, *Stewart contra Nasmyth.* Forbes MS. 29th January 1714, *White contra Reid.*-----The first gift of escheat, tho' taken upon the expences and for the behoof of the rebel, was preferred to a posterior gift taken against him, he being relaxed before declarator was intended upon the last gift. Haddington, February 1601, *Fleming contra Bailie of St. John's kirk.*-----Two gifts of escheat, both past the seals in one day, were declared to be conjoined, and the donatars brought in equally. Here the first citation in the declarator was not regarded, because both declarators were alledged to be informal. Stair, 21st July 1665, *Dickson*

Competition between gifts of escheat.

Dickson *contra* Ker. ---- In a competition betwixt two donatars to a liferent-escheat, the Lords preferred him whose summons of declarator was executed three days, and the day of compareance also three days before the execution and day of compareance of the other summons, altho' the other's gift was a quarter of a year dated and expedite before his who was preferred. Durie, *ult.* January 1635, Ld. Renton *contra* Ld. Wedderburn.

Competition
betwixt a gift
of liferent
escheat, and a
discharge of
the same.

A SUPERIOR, after lapse of year and day, granting a discharge of the liferent-escheat, and of the same date making a gift of the same, in a competition anent the mails and duties, the vassal was preferred, because a discharge is of itself a complete legal deed, without need of further solemnity, whereas, tho' the liferent-escheat be established in the superior's person *ipso jure*, by lapse of year and day, yet he is not denuded by a gift, until the same be intimated by a general declarator, in so much that a second gift, with the first declarator, would be preferable. Stair, 19th June 1669, Scot *contra* Langton.

Donatar's
back-bond,

A PRIOR donatar's backbond, bearing, That he should use the gift by advice of the Lord Thesaurer, he being refounded all his charges, to the effect that no creditor should be prejudged; this donatar nevertheless was found to have good right to the rebel's goods, as long as there was not a creditor to claim the benefit of the bond, altho' another posterior donatar, who was not a creditor, offered to satisfy him all his charges. Durie, 25th November 1626, Earl Kinghorn *contra* Wood. ---- The surreptitious taking out a gift of escheat, without a backbond, after the acts of exchequer *anno* 1661 and 1663, whereby gifts are prohibited to be expedite till the donatars grant backbond, was found not to benefit the donatar, but that the gift was qualified even against singular successors, as if a backbond had been actually granted. Stair, 22d February 1672, Thesaurer-depute *contra* Lady Ayton.

Barons of
exchequer *fun-*
di by the first
gift.

A GIFT of single and liferent-escheat being burdened with an annuity to the rebel's lady, which she had by a former husband, another creditor applying for a second gift of escheat, compareance was again made for the lady, and, upon debate, the barons restricted her annuity to a lesser sum, and burdened the second gift with the same: the second donatar coming thus to have right to the balance of her jointure, in a pursuit for the same, it was found, That there was a *jus quasi-tum* to the lady by the first gift, and the barons *functi*, after which they had no power to restrict the annuity. Fountainhall, 28th December 1697, Howison *contra* Bruce.

GIFT OF FORFEITURE.

IN a competition betwixt two gifts of forfeiture, the one being six days prior in date, but both presented to be past in exchequer at one time, and the exchequer so far preferring the posterior gift, that it

it was first revised and past, whereupon protestation and instruments were taken by the first donatar, that this preference should no ways prejudice his gift; the Lords preferred the first gift and infestment following thereon, altho' the sasine was thirteen months posterior to the sasine upon the other. Fountainhall, 12th February 1697, Viscount Teviot *contra* Earl Linlithgow and Callendar.

GIFT OF NON-ENTRY.

A GIFT of non-entry was found not to extend to non-entries supervenient after the date of the gift. Balfour, (*Non-entry*) ult. July 1543, the Queen and Edward Stewart *contra* George Colquhoun. --- A superior having granted to his feu-vassal a gift of the non-entry-duties, the same was found not to comprehend the feu-duties that fell due during the non-entry, and therefore the superior's action for these feu-duties was sustained. 23d July 1728, Viscount of Arbuthnot *contra* Rait.

What it comprehends.

THE first donatar of ward, non-entry, &c. having executed a summons against a second donatar, was preferred to him, altho' the second had obtained first possession. Balfour, (*Double and fraudulent alienations*) 28th July 1541, Edward Stewart *contra* Ld. Lufs. --- Two gifts of non-entry being made by the sovereign, the one to a stranger, and the posterior in favours of the vassal's heir himself, who accordingly was in possession; the Lords, in a declarator pursued at the instance of the eldest donatar, preferred the second, because of his possession, tho' posterior *tempore*, and his gift never declared. Maitland, 14th February 1566, Rollock *contra* Dingwal. --- The last gift of non-entry being intimated to the tenants, was preferred to the first gift, altho' the first donatar had raised the first summons. Balfour, (*Non-entry*) 2d April 1568, Lockhart *contra* Lockhart.

Competition betwixt gifts of non-entry.

GIFT OF WARD.

A GENERAL gift of the ward and marriage of one who has lands holden of the king, some in taxward and marriage, and some untaxed, the said gift will comprehend only the untaxed lands, and not the taxed. Haddington, 30th January 1612, Lord Kintail *contra* the king's thesaurer. --- Gifts of ward do not comprehend taxward, unless expressed, for taxward is look'd on as a part of his majesty's fixt rent, like a feu-duty, for which the ground may be pointed, whereas simple ward is casual, and such only use to be compounded for in exchequer: And here the defender had other ward-lands untaxed, which was the proper subject of the gift. Marcus, (*Ward*) February 1687, Blairdrummond *contra* Ld. Innernytie. --- The Lords found, That a gift of taxward, did not defend against, nor comprehend

Gift of ward and marriage.

hend a fimple ward. Fountainhall, 23d and 24th February 1687, Lord chancellor *contra* Ld. of Innernytie.

Of ward and non-entry.

FOUND, That a gift of ward and non-entry could be no further extended but to the non-entry of three terms, after the majority of the apparent heir of the lands. Hope, (*Non-entry*) Duke of Albany and York *contra* Earl Morton.---- Found, That a gift of non-entry, subsequent to a ward, gives only interest for three terms after the ward expires; and therefore that a new gift must be taken of the non-entry, and a new declarator obtained thereupon. Auchinleck, (*Non-entry*) 10th February 1632, Maxwell *contra* M'Ghie. Haddington, July 1611, Ld. Coldingknows *contra* Ld. Corbie. Haddington, 14th February 1610, Livingston *contra* Maxwell.

GLEBE.

What ministers entitled to a glebe.

NOWITHSTANDING that ministers of country parishes, and not those of royal burghs, are, by the act of parliament, to have glebes, yet the Lords found a glebe due to the minister of a burgh royal, in respect the act 21st, parl. 1663, only means such burghs as have no landwart at all in the parish. Newbyth, 17th December 1664, Anderson *contra* his parishioners.---- Found, That the minister has right to crave grafs to be design'd to him out of the landwart parish, or the sum of L. 20 yearly for foggage, reserving to those, out of whose lands the said designation shall be made, their relief against the rest of the heritors of kirk lands within the parish, conform to act 21st, parl. 1663. Fountainhall, 25th March 1685, Williamson *contra* his parishioners.

Kirks being united, the minister has right to both glebes.

IN anno 1618, one kirk being united to another by act of parliament, the first having a glebe, and the other never having had any, the Lords found nevertheless, That the minister could not be excluded from seeking a glebe in the other also, altho' thereby he would have two glebes. Durie, Auchinleck, (*Glebe*) Spotiswood, (*Kirk patrimony*) 22d January 1631, Rough *contra* Keir.

Presbytery's jurisdiction in designing glebes.

THE Lords advocated *simpliciter* the designation of an augmentation of a glebe, and refused to remit the same to the presbytery, with instructions, they having made the designation out of lands that were not church lands, tho' there were church lands in the parish, and had appointed the private road to the glebe to be 20 foot broad, &c. tho' they alledged, That the presbytery's jurisdiction in such designations was privative, as the bishops was. Fountainhall, Forbes, 5th December 1710, Potter *contra* Ure.---- Found, That it is in the minister's option, either to take L. 20 for his grafs, or to seek land to be allocated to him for that use; but that the presbytery must not pitch upon arable land, that has been in use to be tilled, yet so that heritors, on the other hand, must not, *in æmulationem*, till up that which was in use to be lee, since so they might leave nothing for the minister but moss

moor, muir, hills or rocky ground, to the defrauding the good design of the law, and the minister's manifest prejudice. Fountainhall, 31st January 1712, Steel *contra* his parishioners.

THE Lords sustained a designation of a glebe, altho' it was not measured, because the designation bore, That the metting was hindred by the defenders servants, who threatned the metster, and would not suffer the commissioners to use the order appointed by the act of parliament, so that they were constrained to design the glebe, without metting, according to their own estimation. Durie, 5th July 1626, Ld. Kerse *contra* Reid Minister. --- The designation of a glebe was found null, notwithstanding it bore to be made by the moderator, and others of the presbytery, with the advice and assent of the whole elders and honest men of the parish, because there was none denominated *specifice*, nor did it bear, That the presbytery had given warrant to the moderator to design it. Spotiswood, (*Kirk patrimony*) Durie, 13th June 1628, Hamilton *contra* Atlington. --- In a removing at the minister's instance, against the heritor, out of whose lands the glebe was designated, the designation was sustained, tho' the intimation to the parishioners was not mentioned in the designation, it being alledged as constant custom, That there is only intimation given at the kirk-door, or out of the pulpit, of the day of designation. Stair, 28th January 1668, Muthet *contra* Duke of Buccleugh.

FOUND, That a minister may get the kirk lands nearest to the kirk and manse designed to him, altho' the same have been lately built up in dwelling-houses. Haddington, 6th January 1594, Cuninghame *contra* Ld. Kirkmaholm. --- The situation of a kirk being altered from one place of a parish to another, with consent of the parishioners, tho' without an act of parliament or of the commission, yet the minister wanting a manse or glebe, or part thereof, the Lords found, That what he wanted might be designed to him out of the kirk lands lying most ewest to the new kirk, because of the consent of the parishioners. Auchinleck, (*Glebe*) 3d February 1629, Cheyne *contra* parishioners. --- The Lords found, That the 48th act, parl. 1572 was conceived as well in favour of the heritors as of the ministers; and therefore, if there be church lands of the same holding near his manse, that he must not pick and choose to design land that lies remoter from him, because better. Fountainhall, 1st December 1680, Muir minister of Fraserburgh *contra* the heritors.

FOUND, That a minister may get his glebe design'd, altho' the lands be meadow and myre, and part thereof houses and yards, set out to feuars, because the word *arable lands* in the act of parliament is conceived in the minister's favours, so that he may seek other lands, where there is no better to be had: And as to the houses, yards, &c. the Lords found, That he could not be debarred thereby, there being no other kirk lands in the parish. Durie. 13th July 1636, Lamont *contra* Bennet.

FOUND, That bishops lands, altho' most ewest to the manse, cannot be designed where there are abbots lands in the parish, altho' they have been possessed by ministers, and environed by the manse and old glebe: Hope, (*Kirk*) 28th June, Nicolson, (*Kirkmen*) 2d July 1622, Nicolson *contra* Porteous. --- In a removing from a glebe, this defence, That there was land nearer than the land designed within the

precincts of an abbay, was repelled; because the abbacy was annexed to the crown, and the lands now imparked, and never tilled. Durie, 13th February 1629, Lord Dumfermline *contra* M'Gill minister there.

--- A glebe was found not designable out of the abbay lands, where there were parsons lands; which the Lords found ought first to be discussed, altho' the same were of old feued, and a part of a town built thereupon, and consequently not arable land; yet the feuers were found obliged either to remove or purchase another glebe to the minister; and this, because the act 48, parl. 1572, seems to extend as well to the glebe as to the manse. Durie, 24th July 1629, Nairne *contra* Boswell.

--- In a dispute about the designation of a glebe, the Lords found, That abbots, priors, or bishops lands, ought to be first designed, before lands belonging to a chaplainry could be acclaimed, altho' the chaplain lands were at hand, and the other three miles distant, which is a great inconveniency to the incumbent; and found, That the act of parliament, speaking of contiguity, is so to be understood, that the most ewest lands of the same kind should be designed. Durie, 13th July 1636, Haliburton *contra* Paterfon. --- Parsons lands must be designed, in the first place, for a glebe, before bishops lands, according to the order of the act 165, parl. 1593. This found, tho' the parsons lands were feued out before the act, and built with houses incorporate within a burgh-royal. Stair, 25th January 1665, parson of Dysart *contra* Watfon.

4to, Temple
lands.

IN a pursuit at a minister's instance against the heritors, for a legal glebe, grass, &c. temple lands were found not to be kirk lands in the sense of the act of parliament. Fountainhall, 12th February 1698, Duncan *contra* parishioners of Kirkpatrick-easter.

Once design-
ed and pos-
sessed, cannot
be a second de-
signation.

A GLEBE once designed and possessed, the Lords refused to allow any new designation; but there being a question about the quantity, they ordained it to be measured of new. Haddington, 25th May 1605, Nairne *contra* Tweedie. --- A minister charging upon his designation to infect him therein, and the feuer suspending on this reason, that there were kirk lands more ewest. The minister answering, in fortification of his designation, That his predecessor had possessed the lands for twenty years before, as glebe, the minister was preferred. Haddington, 7th March 1610, Henderson *contra* Ld. Lagg. --- A manse and glebe long possessed by designation out of lands holden of the king, and most ewest, were found to debar all new designation. Nicolson, (*Kirkmen*) 14th December 1621, Clark *contra* Ramsay. --- A presbytery having design'd a new glebe to a minister, on pretence that the old one was barren ground, and at great distance from the manse; the Lords, in a suspension of this designation, found, That there could be no designation of a new glebe by the presbytery, till it had first been cognosced before a judge competent that the first was sufficient; and found, that they were not impowered to change the glebe that had been possessed past memory of man, by giving a new one; but if there were inconveniencies, the minister might pursue declarator before the Lords, to get them amended and repaired: And therefore their Lordships reduced this new designation of a glebe, reserving his legal remedies as accords of the law. Forbes, 24th, Fountainhall, 27th December 1709, Linnen *contra* Baillie.

FOUND,

FOUND, That the minister may get pasturage and feuel in any com-
 monty where the feuer has pasturage, but not within the feuer's pro-
 perty. Haddington, 25th May 1605, Nairne *contra* Tweedie. ----
 A minister found intitled (besides his four acres of glebe) to a horse
 and two cows grafs out of the vicar's land next adjacent. Durie, 2d
 February 1630, Hamilton *contra* Tweedie. See act 21st, parl. 1663.

Feuel and
pasturage.

A MAN's feu being that which was of old the vicar's manse, which
 was discharged to be feued out by the act of parliament 1563, and
 being now designed and evicted by the minister for his glebe, ; the
 Lords, nevertheless, allowed him his relief off the other possessors of
 kirk lands in the parish, and this altho' his feu was not confirmed till
 the year 1565, tho granted *in anno* 1562. Durie, 12th February 1635,
 Cock *contra* parishioners of Auchtergovan. ---- In the same cause, one
 of the possessors holding his lands now of a college, to which they
 were mortified before the act 202, parl. 1594, which appoints relief, and
 so seeming to cease to be kirk lands ; yet the Lords found, That
 such lands cease not to be kirk lands, and therefore that they ought to
 pay for relief. Durie, *ibid*.

Relief conti-
petent to the
heritor whose
land is ta-
ken for a
glebe.

Grounds and Warrants.

IN a reduction of a decret, the Lords found, That the defender
 was not obliged to produce the execution of his summons at the di-
 stance of fourteen years. Colvil, February 1583, Gordon *contra*
 Ld. Glenkindie. ---- After twenty years parties are not bound to pro-
 duce the warrants of their decreets, which use to be left in the clerks
 hands, *viz.* summons, executions, supplement and execution thereof,
 charge to enter heir, &c. and therefore, in a reduction and improba-
 tion, certification was only sustained against the grounds of a decret,
 and not against the warrants. Stair, 18th February 1675, Brown
contra Home. ---- Certification in a reduction and improbation cannot
 pass against warrants after twenty years, unless it be offered to be pro-
 ved by the defender's oath, that they are still extant, and kept up by
 him. Fountainhall, 20th June 1706, Strachan *contra* creditors of
 Edzel. ---- Found, That after a long interval of time (in the present
 case it was fifty seven years) a compriser could not be urged to produce
 the warrants of his comprising. Durie, 19th July 1631, Earl King-
 horn *contra* Strang. ---- In an improbation of a comprising, the defen-
 der was obliged to produce the executions and warrants of it, tho' it
 was twenty years since its date, because the clerk in this case is a pri-
 vate person named by himself, for whom he is bound to answer, and
 from whom he may take up the warrants. Durie, 24th March 1632,
 Ruffel *contra* Dick. ---- The want of the execution of the denouncia-
 tion of a comprising, is not good to annul the comprising after twenty
 eight years. Durie, 7th July 1636, Nicolson *contra* Burnet. ---- In
 a reduction and improbation an apprising being produced, the Lords re-
 fused certification against the letters and executions of the apprising af-
 ter so long time, the apprising being led *anno* 1621, and the process

Executions
and other
warrants un-
necessary after
twenty years.

of reduction not raised till the year 1650. Dirleton, 16th, Stair, 20th, Newbyth, 20th November 1666, Blackwood *contra* Purvis. --- The Lords found, That *post longum tempus* the executions of a comprising needed not be produced in an improbation, they being set down in the decreet, since no less than thirty years had past before improbation was raised. Gosford, 19th February 1669, Swan *contra* Burnet. --- In an improbation of a comprising, the Lords assoilzied from the production of the executions, letters and claim of apprising, because the decreet was produced, being no less than thirty six years old, and the appriser in possession by virtue of it; but found, That the bonds and other grounds of debt on which it was led, ought to be produced. Fountainhall, 14th November 1678, Dalmahoy *contra* Ainsly. --- There was found no necessity to produce letters of apprising or execution thereupon, being of an old date; but it was found necessary to instruct the debts whereupon the apprising proceeded, any time within the long prescription. Stair, 11th February 1681, Kennoway *contra* Crawford.

General and special charges. IN a reduction and improbation of a decreet of constitution against one as charged in general to enter heir, and of an adjudication following thereon, the Lords refused to grant certification against the general charge and executions thereof after twenty years. Forbes, 20th February 1713, Morison *contra* Earl of Leven. --- The want of a special charge even after twenty years, sufficient to cut off accumulations of an adjudication. 8th July 1724, M'Brair *contra* Maxwell. --- The want of the executions of general and special charges, after twenty years, is no nullity or ground of reduction. 26th November 1725, competition Sir William Cockburn with the creditors of Calderwood.

Warning and precept. IN a reduction of a decreet of removing, the Lords refused to reduce for not production of the warning and precept whereon decreet had followed, as being *in re antiqua*, viz. sixteen or eighteen years before. Colvil, 10th December 1577, Forrester provost of Stirling *contra* Ld. of Jarden. --- Otherwise, where it was but seven years. Haddington, 5th December 1610, Robertson *contra* Moscrop.

Edict. THE Lords found, That an executor-dative is not bound to produce the edict whereupon the decreet-dative proceeded; and that the not recording of the testament-dative in the commissaries register could be no ground for improving the testament, since it was not the executor's fault, but the clerk's. Newbyth, 2d February 1668, Ker *contra* Pringle.

Procuratory for using an order of redemption. A PROCURATORY for using an order of redemption, is a ground and not a warrant, and therefore must be produced in a reduction and improbation, even after twenty years. Marcus, (*Improbation and Reduction*) January 1683, Bogil *contra* William Anderson.

Comprising. FOUND, That comprisings, whereupon fines and infestments were exped, could not be decerned to make no faith for not production, seeing they remained at the signet for the warrant of the seal the time of expeding the signature for infestment; and so the party could not be bound to produce the same: But if no infestment had followed on the

the comprising, they found, That it behoved to be produced, because it was to be presumed in the defender's own hands. Durie, Spotifwood, (*Improbation*) ult. February 1628, Earl Nithisdale *contra* Ld. Westraw. ---- But thereafter this being proponed in another cause, the Lords refused to give answer upon the general, but superseded till production came to be satisfied; at which time they declared they would consider what comprisings should be produced, and what not. Spotifwood, (*Improbation*) 6th July 1631, Lord Chancellor *contra* his vassals of Rattary. ---- Certification is not sustained against an apprising, if the infestment thereupon be produced. Stair, 20th January 1665, Little *contra* E. Nithisdale. ---- Before the year 1626, apprisings were left at the great seal, as the warrants of infestment following thereupon; and therefore charter and sasine upon an apprising, dated before the 1626, sustained, and certification refused to be granted for not production of the apprising. Stair, 29th July 1680, Ld. of Strowan *contra* Marquis of Athole. ---- The like. January 1722, Sinclair *contra* Earl Broadalbin.

THE Lords found a defender in a reduction and improbation was not obliged to produce any other grounds and warrants of the decret ^{To support a decret, the defender bound only to produce the grounds and warrants that belong to himself.} craved to be reduced, but only such as had been his own proper evidents and writs produced by himself *in modum tituli*, or otherwise; as for instance, if I obtain a decret on a bond, if that decret be afterwards quarrelled in a reduction, I am bound to produce that bond, else the pursuer will get certification against it; but if they be writs, by which I proved the passive titles on the defender, or by which I proved he acted as tutor, (as in this case) and which I recovered out of third parties hands, I am not bound to reproduce these, when you call for them in a reduction of the decret. Fountainhall, 2d February 1693, Irvine *contra* Graham.

CERTIFICATION was even refused against a decret of an inferior court pronounced above eight score of years ago, a charter of apprising following thereupon, and infestment being produced, the decret falling to be in the clerk's hands; and tho' the party ought regularly to condescend upon the date, yet that could not be required *post tantum temporis*. Stair, 29th July 1680, Ld. Strowan *contra* Marquis of Athole. ^{Decreet of an inferior court.}

THE heir of a family, in a reduction of a bond of provision granted to a younger son, having obtained the same to be found extinguished by satisfaction, and craving it to be delivered up to him; the Lords considered, that where a writ is declared false, they ordain it to be cancelled in their own presence; but when it is only found null, 'tis sufficient if it ly in the clerk's hands, as a warrant for the decret; tho' thereby the decret lies open to be challenged for forty years, by a reduction reductive: And so the Lords refused the desire of the bill. Fountainhall, 29th June 1699, Earl of Northesk *contra* Ld. Finhaven. ^{A bond reduced, if it must be given up to the pursuer, or ly as a warrant?}

HEIR and EXECUTOR.

Heir pursuing for a moveable debt.

AN action of spuilzie was sustained at the instance of an heir, tho' the goods spuilzied were moveable, because year and day was past, and the action not pursued by the executor. Maitland, March 1557, Ld. Collington *contra* Johnston.

Heirs interest in the moveables.

FOUND, That the defunct's heir has interest to improve the nomination of an irresponsal executor in a testament, because, if the moveables be embazled, the debts will fall upon the heir. Haddington, 28th January 1609, Wood *contra* Lady Bonitoun.

Relief among heirs.

FOUND, That the heir should have his relief off the executor of all moveable bonds, and the executor should be relieved by the heir of all such as are heritable. Durie, Spotiswood, (*Executor*) 30th July 1630, Ld. Carnoufie *contra* Meldrum.--- Where a defunct's succession splits, and he comes to be represented by two different heirs of line, which may happen in many cases, the heirs have no total relief one against another, but only in proportion to the subjects they succeed to: And therefore an heir having made up titles to a part of his father's estate, and his sister, after his decease, having made up titles to what remained *in hæreditate jacente* of the father, neglecting her brother's succession, as being overcharged with debt; in a question betwixt her and her brother's creditors, with respect to a bond of provision granted to her by her father, upon which she was a preferable creditor; the Lords found, That she could not draw the whole out of her brother's estate, but proportionally out of both, as well that part she succeeded to, as the part that her brother succeeded to. 3d February 1736, Ker *contra* Thomson.--- A man dying, left a daughter of one marriage, and a son and daughter of another; the son, making up titles to a part of the estate, died also; his full sister entred heir to him in that part, and she and her half-sister made up titles to the remainder, as heirs-portioners to the father; it was found, That the relief of the father's debt, betwixt his two daughters, ought not to be equal, tho' heirs-portioners, but in proportion to the respective parts to which they succeeded, whether immediately to the father, or mediately by representing the brother. Stair, Gosford, 10th June 1673, White *contra* White.--- In a process at the instance of two heirs-portioners against the 3d, for payment of a debt due to them by the defunct, *singulari titulo*; the Lords sustained this defence, That the debt was extinguished by confusion for two third parts, to which they succeeded as heirs-portioners, but repelled the defence as to the other third part. Bruce MS. 12th July 1716, Wrights *contra* Smiths.--- An heir-male evicting the estate from the heirs of line, who had entred, and, upon the faith that the estate was their own, had paid several debts, the question occurred, if relief was competent to them against the heir-male. It was pled for them, that he ought to be ultimately liable who enjoyed the defunct's estate, seeing it is most rational, that the defunct's debts should be paid out of his effects; upon this footing stands the relief betwixt the heir and executor: The Lords found no relief competent. 12th July 1717, Maxwell

Maxwell of Monreith *contra* Houston of Calderhall. N. B. This was reversed by the house of peers.

WHETHER the heir is at all liable to aliment the defunct's family till next term after his decease, was superseded till diligence should be done against the moveables. Stair, 20th December 1662, Lady Tarfapp *contra* Ld. of Tarfapp. If the heir is liable for the reliq's aliment till the term?

WHO is heir, who executor. See *Succession*.

WHAT rights go to the heir, what to the executor. See *Heritable and moveable*.

WHAT go to heirs and against them. See *Personal and transmissible*.

NO discussion betwixt heir and executor. See *Discussion*.

HEIR apparent.

FOUND, That an apparent heir, tho' he cannot remove tenants, yet he may defend them in a removing pursued by another. Apparent heir entitled to continue his predecessor's possession, and to defend, tho' not to pursue. Gilmour, 15th December 1664, Inglis *contra* Kellie.---The like. Hope, (Heir) Durie, 19th January 1627, Ld. Roslin *contra* tenants. Gofford, 12th November 1669, Ld. Ardkinglass *contra* Ld. Glencardel. ---In a reduction of a feu, *ob non solutum canonem*, found, That the apparent heir might be allowed to purge at the bar, tho' not infest. Newbyth, 26th June 1666, Ld. Wedderburn *contra* King. --- An apparent heir was found to have right to continue his predecessor's possession, notwithstanding of a disposition and infestment from the defunct, which is a good foundation for a process of removing, but cannot entitle the dispoonee to turn the granter, or his apparent heir out of possession *brevi manu*. Fountainhall, 24th June 1698, Sir Robert Home of Renton *contra* Sir Patrick Home.

IN a competition betwixt an heir-male and an heir of line for the present possession, the heir-male having attained the natural possession, and the heir of line being out of the kingdom, but writing a letter to a party to continue the predecessor's possession by virtue whereof she attained possession of a part of the estate, and the heir-male of the rest; the Lords inclined to sequester the rents during the dependence, and till the event of the heir-male's reduction, and so would give neither of them the prerogative of possession in the *interim*, till it were known on whose side the right lay. Fountainhall, 11th January 1712, Lord and Lady Hawley *contra* Earl Dalhousie.---The Lords found the apparent heir of the investitures was entitled to continue his predecessor's possession, notwithstanding the defunct, by a personal deed, had made a settlement of his estate to others, for whom it was contended, tho' commonly apparent heirs may continue their predecessor's possession, yet where that apparenacy is cut off,

even, by a personal deed, all the privileges of it fall to the ground. Accordingly, in similar cases, the Lords have alwise been in use to give possession, *secundum tabulas*, and there's good ground in equity as well as law, *quia frustra petit quod mox est restitutus*; which was repelled, in respect that a disposition is no title for possession, except in consequence of infeftment, tho' containing procuratory and precept; and in the present case, where there was neither procuratory nor precept, the disposition could import nothing but a mere personal obligation upon the heir of investiture, to denude in favours of the disponent, which was perfectly consistent with the apparent heir's possessing the subject, ay and while he should be obliged to make up his titles and disponent. 18th July 1727, Sir Alexander Ogilvie of Forglin *contra* Sir Alexander Reid of Barra.

What right
has he to the
rents?

THE Lords refused to sustain action of mails and duties against tenants at the instance of an apparent heir not infeft, altho' the tenants pretended no right. But the pursuer offering to find caution to make the farms forthcoming to all parties having interest, because the tenants might become insolvent, this offer was sustained. Durie, 19th February, Spotiswood, (*Heirs*) 26th February 1633, Oliphant *contra* his tenants. --- The like. Auchinleck, (*Air*) 29th February 1628, Ross *contra* his tenants. --- The tenants of a *hereditas jacens* may safely pay to the apparent heir, tho' he cannot pursue them, unless they have once acknowledge him by payment; and therefore the bygone rents can be arrested for the debts of the apparent heir, and the decreet of forthcoming will stand effectual, tho' the apparent heir die without entring. Gilmour, 13th February 1664, Weir *contra* Drummond. --- Rents of the estate unuplifted by the apparent heir, belong to his executors, and remain not *in hereditate jacente*. Stair, 7th July 1681, M'Brair *contra* . But upon a review, the Lords were clear to alter this interlocutor, and to find, That all unuplifted mails and duties were *in hereditate jacente* of the last vassal dying infeft in the lands, to be carried by the heir, connecting his titles with him by infeftment; but being loth expressly to rescind that interlocutor, upon which an act was extracted, they contented themselves to explain and clog it thus, That in the competition of debts due by the defunct last infeft, and debts of the apparent heir, the mails and duties should be liable *primo loco*, to satisfy the former, which explanation served the pursuer's purpose for extinguishing an apprising led upon debts due by the defunct last infeft. Fountainhall, 20th, Marcus, (*Airs*) Falconer, 22d November 1683, M'Brair of Netherwood *contra* Rome. --- Found, That the executors or assignies of apparent heirs, dying unenter'd, have no right to mails and duties of lands, or to annualrent of heritable bonds resting unuplifted the time of the apparent heir's decease, tho' payment made to apparent heirs will exoner tenants. And it came not to be debated here, if the apparent heir's executors would be liable to restore what was unconsumed of that which he uplifted. Marcus (*Airs*) February 1688, Balgon *contra* James Hay. --- The Lords found an apparent heir may pursue for tiend-duties, whereof his predecessor died in possession, seeing the decreet will secure the debtors. Marcus, (*Airs*) March 1685, Ld. Wedderburn *contra* Ld. Longformacus. The author observes, That this decision is not agreeable to principles; for tho' tenants, paying their rents to an apparent heir, are excused, yet

yet the apparent heir having no title in his person, should have nothing but his aliment, and therefore cannot transmit the rents to his executors; and in a competition, the heir serving to the defunct last in test, will be preferable to the creditors of the heir dying in apparenacy, not being creditors for his aliment, as he says, was found. January 1683, Ballantyne *contra* James Bonar's relict.

THE privilege competent to apparent heirs by act 1695, to sell the predecessor's estate at a publick roup, found competent, notwithstanding the pursuer had behaved as heir, and become thereby liable to all the debts of his predecessor. 28th February 1733, Blair *contra* Stewart. Apparent heir's privilege of selling his predecessor's estate at a publick roup.

Redemption of apprisings from apparent heirs.

THE power of redemption from the apparent heir, purchasing in expired apprisings, competent by act 1661 C. 62 to the posterior apprisers, was extended also in favours of the personal creditors. Stair, 11th, Gosford, 21st July 1671, Maxwell *contra* Maxwell. Stair, Gosford, 9th January 1677, Hay *contra* Gregory.-----But one having granted bonds of provision to his children, after the expiring of an adjudication upon his estate, the adjudication purchased in by the apparent heir was not found redeemable by the children. Marcus, (*Contracts of marriage*) 31st January 1682, Nasmyth of Possio *contra* his brothers.

THIS privilege extended against apparent heirs purchasing in such rights during their predecessor's lifetime. Stair, Gosford, 19th June 1668, Burnet *contra* Nasmyth. Marcus, (*Comprisings*) January 1685, Sinclair *contra* Sinclair.

AN apparent heir having acquired a disposition of his predecessor's lands from one having right thereto by an expired apprising; the Lords found the lands redeemable by his father's other creditors within ten years, as if he had acquired right to the apprising. Marcus, (*Comprisings*) February 1687, Fife and Livingston *contra* Cunningham of Barns.

AN apprising led, both against principal and cautioner, purchased in by the apparent heir of the principal debtor, was found redeemable by the creditors of the cautioner, so far as it respected the cautioner's estate, for the sums paid therefor, tho' it was not, in the precise terms of the act, *an apprising of his predecessor's estate*. Gosford, 18th, Stair, 22d February 1671, Dunbar *contra* Dick.

APPRISINGS acquired by apparent heirs gratuitously are redeemable from them within the ten years, for the full sums contained therein. Stair, 13th February 1673, Maxwell *contra* Maxwell.-----The like. Stair, 19th July 1681, Monro *contra* Gordonston.----The like. Gosford, 9th July 1673, Campbell *contra* Campbell.

IN a question, whether an apparent heir, buying in a comprising within the legal, can be obliged by act of parliament 1661, to take the money he gave for it? The *ratio dubitandi* was, That the act makes mention of expired apprisings only, and during the currency of the legal, the other creditors have the ordinary remedy to redeem within the legal, so that there was no need of this extraordinary one; yet the Lords, for securing creditors, found it all one case, whether the appa-

rent heir bought within the legal or after. Fountainhall, 26th February 1685, Campbell *contra* Campbell of Auchinbreck.---- The like. Stair, 21st July 1671, Maxwell *contra* Maxwell.

THIS act not extended against the husband of the apparent heir. Stair, 21st February 1673, Richardson *contra* Lamont. Fountainhall, 29th June 1700, Borthwick *contra* Earl of Winton.---- Unless the right acquired, tho' in the husband's name, is to the wife's behoof, or acquired by her means and money, or the ease granted upon account of her propinquity of blood. Stair, 13th June 1674, Richardson *contra* Palmer. Stair, 15th January 1679, M'Dougal *contra* Guthrie.

AN apprising of a predecessor's estate, was not found redeemable from the apparent heir who acquired the same, while he was only a second brother, and not apparent heir. Stair, Gosford, 17th February 1675, M'Lurg *contra* Gordon.

THE power of redeeming apprisings bought in by apparent heirs, is competent only to creditors, not to the debtor himself. Stair, 3d December 1680, Nasmyth *contra* Nasmyth.

AN apprising of the defunct's estate, purchased in by the heir of line, found redeemable by the heir of entail, who succeeded to the lands; tho' it was pled, *imo*, That the act concerns only apprisings of lands, to which the purchaser may succeed as heir. *2do*, That the act is in favours of creditors only. Marcus, (*Comprisings*) March 1686, Baillie of Torwoodhead *contra* representatives of Edward Ruthven.

IN a question from what time the ten years allowed for redeeming an apprising purchased by an apparent heir, commences, whether from the date of his disposition, (which the act of Parliament 1661 expressly appoints) or of his own and predecessor's creditors, their knowledge of his acquisition? Or, *3dly*, If at least from the date of his infestment registred, after which they may know it? The inconveniency of the first of these being evident, the heir needing only conceal his disposition till the ten years be elapsed, which is to elude the law; the Lords, after a solemn hearing in presence, found the meaning of the act, (tho' the words do not go along) to be from the completing his acquisition, by taking infestment, or charging the superior to enter him, or some other solemn and publick deed, whereby it may become notour. This extension of of the act is observed by the author to have been approved of by all men, as just and equitable. Fountainhall, Falconer, 20th November, Home, December 1683, Mow *contra* Craw.

HAS exhibition ad deliberandum. See *Exhibition* ad deliberandum.

IF entitled to heirship-moveables without a service? See *Service* and confirmation.

WHAT actions may be pursued by an apparent heir? See *Title* to pursue.

WHAT carried by escheat of an apparent heir? See *Escheat*.

WHAT deeds infer the passive titles? See *Passive Title*.

HEIR

HEIR *apparent three years in possession. See Passive title.*

COMPARE *creditors of a defunct.*

HEIR *cum beneficio.*

HEIRS have the privilege to enter upon inventory within year ^{The act 1695, if it retro-spects?} and day of the act, tho' the predecessor be dead long before. Dalrymple, 31st July 1699, Dick *contra* Sir John Erskine.

AN heritor, who died several years ago, leaving an eldest son who survived him seven years, and died unentered, and then the next son offering to serve heir to the father *cum beneficio inventarii*, altho' it was alledged for the father's creditors, That the act of parliament 1695, allows only that benefit within the year of deliberation, whereas many years had now elapsed since the death of him who died last vest and sealed; yet the Lords found, That second or posterior apparent heirs have a year of deliberation, tho' the first had suffered it to expire without serving, and therefore allowed the service, *cum beneficio*, to go on. Fountainhall, 1st February 1704, Bruce *contra* Earl of Southesk.

IT being objected against one who had entered *cum beneficio*, That he could not enjoy the benefit of an inventory, because his service, as heir, was without the year and day after the defunct's decease, altho' the inventory was made up within the year; which last is indeed all that the act of parliament 1695 seems to require; the Lords repelled the objection. Fountainhall, Forbes, 11th February 1708, M'Kay *contra* Sinclair. --- In the same cause, it being further objected against the heir's having the benefit of an inventory, *1mo*, That his inventory contained lands in one shire, and yet it was made up before the sheriff-clerk of another shire, contrary to the said act of parliament 1695. *2do*, That the inventory gave up a sum owing to the defunct only *in cumulo*, whereas the act requires, that it should be full and particular as to the debts to which the heir is to succeed, without which special condescendence, it is easy for any heir to elude the law; the Lords thought that this being a correctory law, it ought to be strictly interpreted, being much abused by heirs; they therefore sustained the objections, and found the heir simply liable for the debt. Fountainhall, Forbes, *ibid.* --- The Lords found the benefit of an inventory not competent to a party who gave up inventories after the service, tho' within the *annus deliberandi*, and before he had any intromission, or was cited by any creditor, or infest upon the service. Forbes, 19th February 1709, Campbell *contra* Campbell.

AN heir *cum beneficio*, as he may pay *primo venienti*, so he may grant heritable bonds in security, tho' the effect be to prefer these creditors to the other creditors of the defunct. ^{May pay primo venienti} June 1733, Veitch *contra* Young and Burn.

Must pay or
assign.

THE creditor of a defunct whose heir was served *cum beneficio*, offering to adjudge the estate, and the heir offering to assign; the Lords found, That an heir served *cum beneficio* may offer an assignation to the inventory, as an executor may; and that the creditor is obliged to accept of it, and so stop the adjudication. Fountainhall, 11th January 1711, Lord and Lady Ormiston *contra* Hamilton. ---- An heir of line served *cum beneficio*, having no intromission with the defunct's estate but what was exhausted by payment of preferable debts, and being debarred from the rest by a competition for preference with the heir-male; was decerned to assign the inventory to the defunct's creditor, to pay the debt due to him. Forbes, 8th November 1712, Vint *contra* Lord and Lady Hawley. ---- An heir *cum beneficio* must pay or assign the inventory; and it is not sufficient that he offers to account for the value of the subject. 12th February 1731, Johnston *contra* Strachan.

Creditors preferable according to their diligence.

AN heir entring *cum beneficio inventarii*, the creditors are not brought in *pari passu*, but according to their diligence, as in ordinary cases. Home, 4th July 1724, Scot *contra* Burnet of Leyes. ---- An heir *cum beneficio* having ascertained the value of the inventory by a process, the creditors of the defunct took decreets against him one after another, in the following general terms, "finding him liable to the extent of the value of the inventory, and decerning against him *secundum vires inventarii*." And they being all called in a multiple-poining, the Lords found, That the priority of citation or decret gives no preference, but the whole subject being *in medio*, the creditors must be ranked according to their diligences affecting the subject: In this case, the Lords could not find otherwise, because there was no decret taken against the heir for a liquid sum, but only a decerniture to pay *secundum vires inventarii*, which was no better than a decret *cognitionis causa*; but it would admit of a different consideration had decreets been taken against the heir, obliging him personally to pay the sums therein mentioned, upon the *medium*, that he had in his hands of the value of the inventory sufficient to answer their claims. Such decreets, with regard to other creditors afterwards putting in their claim, would be equivalent to payment: The heir would be allowed to state these prior decreets as articles of exhaustion, for what in all events one must pay may be held as payment with regard to third parties. 28th November 1738, competition creditors of Crichen.

If the subject is free to the heir upon payment of the proved value?

AN heir entring *cum beneficio*, brought a process against his predecessor's creditors, for ascertaining the value of the estate to be proved by witnesses; concluding, that the estate might be declared to belong to the pursuer, and to be free and disburdened of the predecessor's debts, upon payment to the creditors of the proved value. It was yielded by the creditors, that in a personal action against the heir upon the passive titles, he is no further liable than *in valorem*, because so says the act of parliament. But they contended, that as they had their option to insist personally against the heir, or to make their debts real upon the estate; if they chose the last, there was nothing in the act to bar them from making the best of their debtor's effects, by dividing the subject among themselves, after they had made it their own by legal diligence, or by disposing of it at a publick roup, and dividing the price. The Lords notwithstanding

notwithstanding sustained process, and decerned in terms of the libel. 6th July 1733, Gray *contra* M'Aul. This was in the case of personal creditors. ---- And the like process having been brought against real creditors infest during the predecessor's life, who on the other hand brought a process of sale of the estate upon the statute 1681; and it being further pled for them, That there was no law to oblige them to quit their property, otherwise than upon full payment; yet it was carried by the president's casting vote, that the creditors had no right to bring the estate to a sale, and that the heir was liable only for the value of the estate, as it should be proved. 17th February 1736, Murray *contra* creditors of Pilmuir. ---- But thereafter in another case, upon a solemn pleading in presence, the Lords altered, and found, That the creditors have right to bring the estate to a sale, and are not bound to accept of the value from the heir *cum beneficio*. 12th July 1738, heirs of Strachan of Glenkindy *contra* his creditors.

AN heir entring *cum beneficio inventarii* to an estate overburdened with debt, but having afterwards, by industry, considerably improved the same, disposed a part for payment of a preferable creditor, more than equivalent to the original value of the inventory. Being thereafter attacked by other creditors, the question arose, If he must be liable according to the present worth of the subject, or only for what it was at his entry? It was pled for the heir, That he was not *trustee*, but *proprietar*; that the creditors had no real interest in the subject of the inventory; that the inventory was only design'd as a method to fix a certain value, beyond which the heir should not be liable; and accordingly, that if at any time the heir made this value forthcoming to the creditors, he was at liberty to make of the estate what he would. It was added, That were this otherwise, it would put an effectual stop to the industry and improvements of heirs who enter by inventory, since no man will readily plant where another is to reap. The Lords, notwithstanding, found the heir liable to accout according to the present value. 6th July 1727, Aikenhead *contra* Ruffel.

If he must accout for the profits he makes of the subject?

HEIR *cum beneficio* getting eases from some creditors, is obliged to communicate these eases to the rest. December 1725, Aikenhead *contra* Ruffel.

Must communicate eases.

HEIR PORTIONER.

IN case of heirs portioners, altho' the relief be payable only to the eldest, yet the Lords found, That the same is to be communicated to the rest. Balfour, (*Relief*) 26th February 1623, Fenton *contra* heirs of Dirleton. ---- In a question amongst heirs portioners, Whether the heirship moveables go as a *præcipuum* to the eldest, or divide among all? the Lords found, The eldest sister can only draw her share. 16th January 1725, executors of Lady Garnkirk *contra* Gray. ---- The Lords found, That a messuage ought to be divided among heirs portioners, if it may be equally done, otherwise that it falls to the eldest,

What falls to the eldest as a *præcipuum*?

dest, who must satisfy the rest for their proportions. Gosford, 2d December 1669, Carrober *contra* Sibbald. --- Found, That a country mansion-house belonging to heirs portioners, has no privilege, (as fortalices, &c. have, which belong to the eldest without division, or paying any equivalent to the rest) but is divisible among the heirs. Fountainhall, 12th November 1696, Hathorn *contra* Gordon, --- A man who had a very small land interest of five chalders of victual, leaving five daughters, and the eldest claiming the mansion-house *jure præcipui & ratione primogenituræ*, there being other houses for the tenants, tho' the mansion-house itself was scarce fit for an heir to dwell in; the Lords found, That this being the principal messuage on the ground, it must belong to the eldest daughter, without any equivalent to the others in lieu thereof. Fountainhall, Dalrymple, Forbes, 5th March 1707, Cowies *contra* Cowie. --- The next question being about a large orchard adjoining to the house; the Lords, after trial of the extent and value thereof, first found, (10th June 1708,) That this yard must follow the house, and so belong to the eldest daughter *jure primogenituræ*; but being of a value far above what such a house or small heritage required, that the other sisters ought to get a recompence and satisfaction for their share and proportion thereof. But thereafter the Lords alter'd the said interlocutor, and found, That the whole orchard not having been set for rent, belonged to the eldest sister, without any recompence to be given by her to the rest. Fountainhall, Forbes, 24th June 1708, *inter eosdem*. --- What falls to the eldest heir portioner as a *præcipuum*, with or without recompence to the sisters, debated, but not determined. December 1730, Dunbar of Mochrum *contra* Lady Houston.

Action communi dividundis.

A SHERIFF, upon a brief of division, having allocated lands to the elder sister, and a mill and mill-lands as an equivalent subject to the younger; the Lords found, That these subjects being *separata tenementa*, the two sisters had an equal interest in each; but as the mill could not admit of a division, nor be separately possess'd, they appointed the rents to be divided, and the half to pertain to the eldest sister. Gosford, 2d December 1669, Carrober *contra* Sibbald. --- The like, with regard to *nomina debitorum*. Gosford, 1st February 1670, Dundas *contra* Major Biggar.

HEIRS portioners liable in solidum, or only pro rata. See Solidum & pro rata.

RELIEF among heirs portioners. See Heir and Executor.

ELDEST heir portioner has the custody of the evidents. See Common interest.

HEIRSHIP MOVEABLES.

What moveables are heirship.

WHERE a defunct had several houses, the Lords found, That it is not the furniture of the best house that belongs to the heir, but the best piece of the furniture of each house. Colvil, 10th November 1575, Lord Drummond *contra* the Lady. --- Heirship was found to comprehend six golden buttons, and if the defunct had any number of oxen, 'twas found, that the heirship was a yoke. Item, That

That the heir will get his heirship of steelbow oxen, if the defunct had no other oxen. Haddington, 4th November 1609, Boyd *contra* Russell. ---- The shell of a salt-pan was found not comprehended under heirship, but to belong to the executors. Haddington, 19th January 1711, Reid *contra* Thomson.

No heirship was found due to the heir of a churchman, altho' a dignified clergyman, not being a prelate. Sinclair, 23d May 1542, *Ld. Kincaig contra* Aytons. ---- Found, That a parson provided to a benefice may have an heir. Hope, (*Heir*) Durie, 28th November 1623, Rigg *contra* Mackenzie.

Who intitled to have heirship? *1mo*, heir of a prelate.

HEIRSHIP found due to the heir of a baron who died infest in lands, altho' they were otherwise disposed of than to that heir. Sinclair, 9th July 1543, Crawford and Sempel *contra* Crawford. ---- The brocard, *Semel baro semper baro*, was repelled, unless it could be alledged, that the defunct died infest. Hope, (*Air*) December 1619, Airly *contra* Menzies. Auchinleck, (*Heir*) 2d July 1629; *contra* . ---- A son cannot be pursued upon the passive title of behaving himself as heir, by intrometting with the heirship moveables where the father ceas'd to be *baro*, by having had all his lands comprised, and the legal expired before his death. Durie, 27th January 1636, Straiton *contra* Chirnside. ---- The like. Durie, 8th July 1628, Dunbar *contra* Leslie. ---- One dying infest in an annualrent has heirship moveables; for seeing an annualrent is a *feudum*, an annualrenter may be esteemed a *baro*, as well as a petty feuer. Stair, 19th July 1664, Scrimzeour *contra* executors of Murray. ---- The heir was found intitled to heirship moveables, because the defunct died infest in an annualrent, (tho' it was only a trust) which made him *baro*, he never being denuded. Fountainhall, 21st November 1708, Jamieson *contra* Waugh. ---- Heirship moveables cannot be where the defunct had only a disposition without infestment. Stair, 27th January 1666, Montgomery *contra* Stewart. Stair 22d, Dirleton, 23d December 1674, heirs portioners of Seton *contra* Seton. ---- The like, where he had an heritable bond without infestment. Fountainhall, 22d November 1698, Cumming *contra* Cumming. ---- A defunct's lady being an earl's daughter, and wife to a churchman, who afterwards became a bishop, and having a bond, bearing infestment in lands, tho' not actually infest thereon; yet the Lords found none of these sufficient to give her heirship moveables, unless infestment had followed on the bond. Fountainhall, 25th December 1695, Lord Kilmarnock *contra* Dutchess of Hamilton. ---- A man taking lands to himself in life-rent, and his daughter in fee, is no baron, and has no moveable heirship. Dirleton, 1st February 1668, *contra* Scot. ---- A man having purchased an estate, took the infestments of the same to himself and spouse in conjunct-fee and liferent, and the heirs of the marriage in fee; which failing, to the longest liver of him and his spouse, and their heirs and assignies; there happened to be no heirs of the marriage, whereby the wife surviving fell to have right to the lands, in virtue of the said provision; but she also dying without being served heir of provision, it was questioned betwixt her heir and executor, Whether she could have heirship moveables? It was argued for the heir, That a conjunct-fee, in the person of a relict, has all the effects of a simple and absolute fee, excepting the power of alienation. It was argued

gued on the other side, That such a conjunct-fee resolves merely into a liferent, which is but a servitude ; and with respect to which, there neither can be an heir, nor heirship moveables. The Lords found no heirship moveables due. February 1730, *Monro contra Monro*.

3tio, Of a
burgess.

FOUND, That a defunct's son could not be liable *passive* for intrometting with the heirship goods ; because his father, tho' a burgess, was not alledged to be an actual resident, indwelling, or using trade, but only a honorary burgess. Durie, Spotiswood, (*Heirs*) 8th July 1628, *Dunbar contra Leslie*. ---- The defunct being heir to an actual burgess, who might have entered when he pleased, and bore stent in the town as a trafficking burgess ; this was found a sufficient qualification to make him be considered as a burgess to intitle his heir to heirship moveables. Fountainhall, 22d November 1698, *Cumming contra Cumming*.

In what cases
not claimable.

THE executors of a wife who predeceased her husband, insisting for the defunct's share of the goods in communion, the husband craved deduction of the heirship moveables, which he alledged were heritable, and fell not under communion, answered, Heirship moveables is not a *nomen juris* while the husband is alive. The Lords found, the heirship moveables cannot be deduced. January 1727, *Lindsay contra Carlyle*. ---- The contrary formerly found. Stair, Gosford, 8th December 1668, *Goodlet contra Nairne*.

IF the heir may intromet with heirship without a service? See Service and Confirmation.

GENERAL assignation, if presumed to comprehend heirship moveables? See Presumption.

HERITABLE and MOVEABLE.

Fructus naturales & industriales.

WOODS ripe for cutting at the time of the proprietor's death, whether they go to the heir or executor, debated, but not finally determined, the matter having been taken up by transaction. July 1730, *Scot of Gala contra Hopepringle of Torfonce*.

Bygones are
moveable,
1mo, Blench-
duties.

2do, Feu-
duties.

AN heir served found not to have right to pursue for blench-duties, which were owing to his father ; but only for what fell due since his death. Durie, 16th February 1627, *Lord Sempil contra Blair*.

BYGONE feu-duties belong to the executor of the defunct's superior. Gosford, 24th, Stair, 28th January 1671, *Kier contra Nicolson*. Dirleton, 17th February 1676, *Waugh contra Jamieson*. ---- The same implied. Stair, Gosford, 11th July 1673, *Faa contra Lord Balmerino*. ---- But bygone feu-duties were found a burden upon the heir, for which he had no relief against the executor, seeing they do arise from the feu-contract, the terms whereof the heir only is liable to perform. Home, 29th July 1718, *Wilson contra Bell and Grant*. ---- But this seems to labour under some doubts : For, 1mo, Bygone feu-duties go to the superior's executor, upon no other footing than as move-

moveable. 2do, The executor is liable to implement the feu-contract as well as the heir. Suppose the price is not paid, the executor will be liable to pay the same, tho' the benefit accrue to the heir alone; and there is no doubt the superior may pursue the executor for bygone feu-duties. 3tio, The superior is truly proprietar, in so far as the feu-duties extend, for he only gives away the property as to the superplus rents: Therefore all intrometers with the rents are personally liable to the superior, as intrometers with his rent, viz. the feu-duties. Bygone feu-duties then in the hands of an intrometter, are truly a moveable subject, which must go to executors, and for which the executors of the intrometter must be liable.

THE profits of all casualties of superiority, which require declarator, are carried and implied in the superiority, and therefore belong only to the superior's heir or singular successor, until separated by gift to a donatar, or liquidated by a decret of declarator, because it is *facultatis* of the superior, to lay hold of these casualties or not at his pleasure; and as almost all of them arise from feudal delicts, many superiors do not choose to take these rigorous advantages: Such a privilege therefore, which is *meræ facultatis*, before exercising the same by a gift or declarator, and which presupposes no right established in the superior's person, cannot descend to executors. Stair, Gosford, 11th July 1673, *Faa contra* Lord Balmerino.---- The like. Haddington, ult. November 1609, Earl of Argyle *contra* Ld. Ardkinglas. Haddington, 5th March 1611, Lord Douglas *contra* Crawford.----- It being pled, That a liferent-escheat having *tractum futuri temporis*, belongs not to the donatar's executor, even as to bygones before the donatar's death, unless they had been liquid, and established in his life by sentence, but the gift, and all following thereon, belongs to the heir; the Lords found, That the bygones of the liferent-escheat, preceeding the donatar's death, did belong to his executor, tho', in his life, he had obtained no sentence therefor. Gosford 24th, Stair, 28th January 1671, Keir *contra* Nicolson.---- The like. Durie, 18th February 1624, Ld. Culter *contra* Forbes.

ANNUALRENTS of a sum in a bond, containing a substitution of heirs, falling due before the institute's death, are *in bonis defuncti*, and go to his executors, and are not carried by the substitution. Forbes, 26th January 1711, Lord Elibank *contra* M'Kenzie.---- A subsequent sheriff-depute cannot discharge a fine impos'd by his predecessor, seeing it belongs to the predecessor and not to him. Fountainhall, 25th July 1686, *contra*

WHERE the order of redemption and declarator was after the wadsetter's death, the wadset sums were found to belong to the heir, and not to the executor, because, as to heritable and moveable, subjects are considered as they are at the defunct's death; and in this case, at the death of the wadsetter, the wadset was a subsisting real right. Stair, 18th June 1675, Ld. of Leyes *contra* Forbes.

A BOND bearing a liquid sum to be paid yearly as annualrent, for ilk hundred of a principal sum; so long as the sum resteth unpaid, will not make the bond heritable, and the sum immoveable, unless it bear provision of infestment, or to pay, as well not infest, as infest. Haddington, 8th December 1610, Lawson *contra* Paterfon.---- A bond bearing

a sum to be paid at a term, with so much for the annualrent thereof from the time of the borrowing to the time of payment, and bearing no other clause of payment of annualrent thereafter, found not to be an heritable bond, but to pertain to executors, and come under testament. Durie, 7th December 1627, Porteous *contra* Veitch and Hay.---- A bond bearing an obligation to pay 10 merks for each hundred, with the principal sum at the term of payment, found to be an heritable bond, tho' it bore no clause of infeftment, and that an assignation thereof, made by the creditor, does not alter the nature of it, but that it still remains heritable. Durie, 12th December 1627, Falconer *contra* heirs of Beatie.---- A bond bearing annualrent, tho' without clause of infeftment, is heritable, and preftable by the heir of the debtor. Durie, *penult.* July 1636, Ld. Carnoufie *contra* Ld. Meldrum.

Rights having
tractum
temporis.

AN executor found not liable to pay the annualrents of debts owing by the defunct, arising due after his decease; because the executor can be no further liable than the defunct was, and he could not be liable for a debt not existing at the time of his decease. Durie, 13th June 1629, Inglis *contra* Frazer.---- But the contrary was afterwards found. Durie, 17th February 1632, Kinnaird *contra* Yeaman. Durie, 19th July 1637, Ld. Innerwick *contra* Lady Smeiton.---- An annual payment, as to terms after the debtor's death, was found a burden upon the heir, not the executor. Stair, 5th February 1663, Hill *contra* Maxwell.---- A gift of liferent-*escheat* falls to the heir of the donatar, and not to his executors, except as to bygones. Durie, 18th February 1624, Ld. Coulter *contra* Forbes.

Share of an
incorporate
stock.

THE Lords found a particular share of the capital stock of the African company, due out of the equivalent, moveable, and legally affected, and carried by confirmation of the proprietor's executor-creditor, altho' every part of that stock was established by charter and infeftment held of the crown, for payment of a hoghead of tobacco, and destin'd not to be uplifted, but according to the rules of the company. Forbes, 25th July 1710, Murray *contra* Blackwood.---- Ten shares of the old bank of Scotland having accrued to a lady during her marriage, the question arose, after her decease, Whether they belonged to her heirs, executors or husband? It was generally agreed, That the executors had no claim; if the subject was moveable before the act 1661, it behoved to go to the husband, if heritable, it continued so, for no alteration was introduced with respect to any heritable subject, save bonds bearing annualrent *allenary*. But for the heir it was pled, That bank stock is a right, having *tractum futuri temporis*; the original subscription paid in is sunk into the company's stock, belongs to the company as a politick body, and by no means to any of the partners; the subscriber is entitled to his proportion of the yearly dividends, and that *in perpetuum*: but as these profits are not accessory to any stock or capital belonging to the partner, 'tis that very thing that makes bank stock fall under the definition of a right having *tractum futuri temporis*. Answered for the husband, Tho' the money paid in be sunk into the company's stock, yet there is thereby purchased a *jus crediti*, which is the partners stock; just as in the case of money lent, the property whereof is transferred to the borrower, and all the creditor has, is the *jus crediti*, evidenced by the bond, of which the annualrents yearly arising are accessories: The

The profits therefore arising upon bank stock, are proper accessories of a principal subject, and consequently bank stock is nothing a-kin to a right having *tractum futuri temporis*. The Lords found, That the shares of the bank of Scotland are not heritable, but that they are simply moveable, and fall under the *jus mariti*. 1st July 1735, Sir John Dalrymple of Cowland *contra* representatives of dame Jean Halket.

IN a contract of marriage, the husband being obliged to employ a certain sum on land or annualrent to himself and future spouse, and to the children to be begotten betwixt them, which failing, to his heirs: This clause, albeit heritable *quoad creditorem*, was found moveable *quoad debitorem*, and found performable out of the defunct's moveables. Stair, 25th July 1662, Nasmyth *contra* Jeffray. --- The like. Stair, 19th June 1678, Dickson *contra* Young. --- The like. Durie, 7th December 1627, Porteous *contra* Veitch. Durie, 14th March 1628, Graham *contra* Finnie's heirs. Marcus, (*Executry*) Fountainhall, 1st February 1687, Yeaman *contra* Yeaman. --- In such a case it had been found, That the heir was liable and not the executor. Colvil, November 1586, Hamilton *contra* Lamb. Durie, 11th December 1632, Schaw *contra* Crawford.

Obligation to lay out money upon heritable security.

IN an action at the instance of executors against a party, in whose hands money was lodged by the defunct; the Lords found the sum moveable, notwithstanding the defender's oath, whereby he declared the money was given him to be employed for the man and wife in conjunct-fee, and to the heirs to be begotten betwixt them, and that because no bond was made for implement thereof before the defunct's decease, Hope, (*Executor*) 18th June 1614, executors of Ruffel *contra* Sandilands. --- Sums in bonds being destinated, in a contract of marriage, to an heritable use, yet found they belong'd to executors, because the said destination was not contained in the body of the bonds, and that the sums were not yet uplifted nor employed. Hope, (*Executor*) 8th February 1615, Stewart *contra* Mowat. --- An obligation to lay out money, when paid, on heritable security, does not make it heritable before it be actually settled on land, and therefore it may be disposed of *in lecto ægritudinis*. Durie, 7th February 1635, Watson *contra* Aytton. --- Where a father contracts with his daughter, at her marriage, a certain sum, to be paid, in name of tocher, at a particular term, and makes no mention of annualrents, and the husband binds himself to settle the same and an additional sum to himself and his wife in life-rent, and to the heirs of the marriage heritably, which failing, to the husband's heirs whatsoever; the executor of the wife's father, if he be dead before the tocher be paid, will be liable, *primo loco*, to pay the tocher, in respect of its not bearing interest till paid; but it will be payable to the husband's heirs, and not to his executors, in respect that it was to be heritably secured by him, and to pay annualrents to the relict. Durie, 19th January 1637, Robertson *contra* Seton.

Sums destinated to be laid out upon heritable security.

A BOND secluding executors, assigned in favours of one and his heirs, executors or assignies, is thereby rendered moveable. Fountainhall, 17th June 1680, Sandilands *contra* Sandilands. --- A bond secluding executors being assign'd by the creditor to his wife, with his other effects, without secluding her executors, yet the same was found heritable.

Assignment of a bond secluding executors.

table in the assignee's person, and not to be carried by confirmation after her decease. Fountainhall, 28th January 1708, Muirhead *contra* Lockhart.

Creditor or debtor dying in case of failzie, found to be moveable before the term of payment. *Imo*, of a bond heritable by a clause of annualrent.

A BOND payable at a term named, with annualrent after the term, so as to go to the creditors executors, he dying before the term. Durie, *penult.* June 1624, Smith *contra* Anderson's relict.---- The like, in a bond taken to a husband and wife, and their heirs. Durie, 21st December 1626, executors of Brown *contra* Drummond.---- A bond granted at Whitsunday, payable at Martinmas thereafter, with annualrent from the date, and, in case of failzie, annualrent thereafter during the not-payment, was found moveable, the creditor having died before the term of payment. Durie, Spotiswood, (*Contracts and obligations*) 26th February 1629, Douglas *contra* M'Michael.---- A sum in a bond being payable at the first term after the decease of the creditor's mother, with annualrent after the term of payment, found heritable, so as to go to the creditor's heirs, he dying before the term of payment. Durie, 15th January 1628, Falconer *contra* Beatie.---- The contrary. Durie, 20th March 1633, Simson *contra* White.---- The term of payment of annualrent, and not of the principal sum, does regulate a bond as to the quality of heritable or moveable, when the creditor dies *ante terminum*. Marcus, (*Contracts of Marriage*) 20th December 1682, Ramsay *contra* Ramsay.---- A bond heritable, by a clause for annualrent, to commence at the term of payment of the bond, is moveable, if the debtor die before the term of payment, and his executors are ultimately liable. Durie, Spotiswood, (*Executor*) *penult.* July 1630, Ld. Carnoufie *contra* Ld. Meldrum.

2do, By a clause of infeftment.

AN heritable bond, by a clause, obliging the debtor to infeft his creditor, in case of not payment at the term, found to belong to the creditor's executors, he dying before the term of payment. Hope, (*Executor*) 7th February 1615, Nasmyth *contra* Lord Hay.---- But where the obligation to infeft is pure, and to have present effect, and not adjected as a failzie in case of not payment at the term appointed, there the bond is heritable *a principio*, as to all effects. Home, November, Fountainhall, Falconer, 20th December 1683, Gordon *contra* Ker. Dalrymple, 26th June 1705, Stewart of Pardivan *contra* Stewart of Torrence. 8th December 1738, Menzies *contra* Menzies.--- An heritable bond, wherein the obligation to infeft was not pure but conditional, *failing payment at the term*, found moveable before the term of payment; and therefore the debtor dying before the term, relief was found competent to his heir, who paid the debt, against his executor, Home, February 1718, Fisher *contra* Pringle.

3do, By a clause secluding executors.

A BOND secluding executors found heritable *a principio*, tho' the creditor or debtor die before the term of payment. Home, July, Fountainhall, 5th November 1687, Muir *contra* Muirs. Fountainhall, 20th December 1692, Crawford *contra* Earl Traquair.

Sum moveable, notwithstanding of real security.

LANDS being disposed to a man by a near friend under backbond, being to be for security of 2400 merks already due, and obliging himself to denude, upon payment of that sum, and of what other sums he should advance; and the disponent having thereafter granted to the same party a bond for 5000 merks, bearing no relation to the said security, but

but being a simple moveable bond, to him, his heirs, executors, &c. the Lords found, That this bond, in so far as it should be made appear to be made up of the sum mentioned in the backbond, should belong to the heir of the trustee, because, *ab initio*, the said security was granted for the same, but that the residue should belong to his executors, as in its nature moveable, and not made heritable by the backbond; for tho' the disponee was not obliged to denude, unless upon payment, as well of the sums he should advance, as of what was formerly due, yet this could operate no more but a bare personal retention, which *inerat de jure*, without the clause. Dirleton, 17th, Stair, 18th February 1676, Waugh *contra* Jamieson. In this cause the Lords came to the following resolutions, *viz.* 1^{mo}, That it was consistent that a sum should be moveable, and yet that it should be heritably secured, as in the case of bygone annualrents due upon infeftment of annualrents, bygone feu-duties, for which real action is competent even to executors, wadsets loosed by requisition, &c. 2^{do}, That as to these qualities of moveable or heritable, in relation to succession, the *animus* of the creditor was principally to be considered; so that if an heritable security were afterwards taken for a debt moveable *ab initio*, 'tis presumed the creditor intended that the sum should belong to his heirs; *secus*, if his intention appeared to be otherwise, *v. g.* if a debtor should dispone his estate in favours of a confident person, with the burden of his debts. 3^{tio}, Bonds being taken after a general security, in the terms aforesaid, for debts to be advanced, may be moveable, notwithstanding such security, if it appear that the creditor intended it should be such; *v. g.* if the supervenient bond should be taken to executors secluding heirs, &c. Dirleton, *ibid.* --- A moveable bond, tho' eik'd to the reversion of a wadset, but not registred in the register of reversions, was found to belong to the executor, in regard it is none of the species of heritable bonds contained in the act 1661, as not secluding executors, nor bearing a clause of infeftment. Falconer, 6th March 1683 Rollock *contra* Grant.

A BOND given for the price of lands, and falling to the executor, the annualrent which the Lords allow therefore, tho' not expressly stipulated, belongs also to him, and not to the heir. Durie, 7th February 1628, Home *contra* Ld. Renton. --- A party sold an infeftment of annualrent for 4000 merks, and the minute of sale contained a resolutive clause, That upon not payment of the annualrent for two years, the contract should be void; the price was found to belong to the seller's executor, and also that the infeftment of annualrent would return to him, and not to the heir, in case the irritancy were incurred after the disponer's death: For heritable and moveable are considered as at the disponer's death, and no posterior alteration of circumstances has any influence. Stair, 7th July 1680, Waugh *contra* Jamieson. --- A party who had entered into a minute of sale of lands, obliging himself to dispone, and uplifting part of the price, and then dying intestate, the remainder of the price being still in the purchaser's hands; the Lords found, that the price yet lying in the purchaser's hands was moveable, and belonged to the executors, tho' there was no disposition yet granted, but only an obligation to dispone. Marcus, (*Executry*)

November 1683, Forbes *contra* James. Fountainhall, 22d December 1704, Chieffly *contra* his sisters. --- The Lords found the

executor liable for the price of a house sold to the defunct, conform to a minute of sale unperfected, tho' the heir might claim the disposition to the house to be extended in his favour. Forbes MS. 7th July 1714, *Ker contra Schaw*. ---- A debtor *operatus* having disposed his estate to certain trustees, for the use and behoof of his creditors, with power to them to sell and dispose upon the same, and to divide the price among the creditors; the trustees accordingly entered upon the management with the consent of the whole creditors, were infeft, and found a purchaser for the lands. After the purchaser was infeft, but before the price was distributed, one of the creditors dying, the question occur'd betwixt the heir and executor, which of them had right to his debt, which was a personal bond bearing interest. It was doubted whether infeftment granted to trustees, tho' accepted of by the creditors, had the same operation as if granted to the creditors directly. But the Lords took it up upon a ground less disputable: They found the price moveable, the same having been with the creditors consent; after which there remained nothing but a personal obligation upon the purchaser to pay the price, in the same manner as if the estate had been disposed directly to the creditors, and they had sold the same. 11th November 1737, *Smith contra Smith*.

Adjudication
upon a move-
able bond.

THE Lords found, That the raising, executing and insisting in a process of adjudication, where the creditor died before he obtained sentence, did not alter the nature of the debt from what it was formerly, so as to make it heritable or fall to the heir. Fountainhall, 16th January 1700, *Carnegie contra Carnegies*. ---- A cautioner having paid the debt, and thereupon having comprised the principal debtor's lands, the comprising was found to make the sum heritable, and to intitle the heir of the cautioner to insist in a personal action against the principal debtor, for relief and repayment. Durie, 20th December 1631, *Menzies of Castlehill contra Ld. Cashogill*. ---- An adjudication led upon a moveable bond, makes it become heritable, so as not to be alienable upon death-bed. 12th November 1728, *Reids contra Campbell*.

Accessory se-
curity.

A MOVEABLE bond of corroboration, does not alter the nature of the original heritable bond, but the debt still remains heritable. Auchinleck. (*Obligation*) 12th March 1628, *Craw contra Earl Kellie*. Gilmour, 15th June 1664, *Earl Mar contra Hamilton*, Falconer, 17th January 1683, *Wilhart contra Earl Northesk*. ---- But an heritable bond of corroboration makes the sum in the original moveable bond heritable. Gosford, 22d November 1671, *Ord contra Edmonston*. ---- And a person infeft upon an heritable bond, not payable, nor bearing annualrent till after his decease, having assign'd the same in security of a moveable debt due by him, with procuratory and precept, this accessory security, was found to make the sum contained in the moveable bond heritable, tho' the creditor died before the term of payment of the annualrent-right. 21st November 1734, *Cleland contra provost M'Aulay*. ---- One having disposed his estate to his eldest son, with the burden of certain provisions to his younger children, which he had become bound to pay in his contract of marriage, this was found to make the provisions heritable. Forbes, 4th December 1707, *Aiskine contra Guidlets*.

THE

THE wife's father having taken a discharge of the tocher, upon the narrative of payment, and of the same date having granted an heritable bond to the husband, bearing to be in place of the tocher, and the wife predeceasing within year and day, her heir claimed the heritable bond, as coming in place of the tocher; her executor contended, That the tocher was discharged, and no longer subsisting; that the heritable bond belonged to the husband *jure proprio*, and that he was bound no further than to repete the tocher, which being a personal claim, the executors ought to be preferred, which accordingly was found. Stair, Gosford, 11th December 1668, Scot *contra* Ayton.----
 An heritable bond, in a process before the privy council, being proved to have been abstracted by the debtor, and he decerned by them in the sums contained in the bond; the Lords found, That the sums were not thereby become moveable, but that an inhibition thereafter served, did reach these sums, for they judged, that whatever came in place of the bond, was heritable, as it was, seeing the parties claiming the damages *loco facti imprestabilis*, shewed he had no intention to alter the nature of the debt, or render it moveable. Fountainhall, 31st December 1703, Oliphant *contra* Irvine.

A CAUTIONER having paid an heritable bond before his decease, the Lords found, That the benefit of the relief belong'd to his executors, altho' he had obtained decret against the debtor for repayment of the sums paid out, with annualrent thereof during the not-payment. Durie, 10th July 1628, Cant *contra* Edgar.--- The like. Durie, 18th March 1630, Dr. Hart *contra* Hart.---- A party being infest in lands for his relief of cautionry, and paying the debt, in a competition betwixt his heirs and executors, the heir claiming upon the heritable bond of relief, and the executors founding upon the clause of of relief in the principal bond, the Lords found, That the sums were due to the heir only, as he who only could renounce the infestment. Auchinleck, (*Air*) 10th July 1629, Wardlaw *contra* Wardlaw. Durie observes this decision as if the contrary had been found.

Diligence upon heritable subjects.

THE creditor in an heritable obligation, taking decret for payment, and thereupon arresting, this found to render the subject moveable, and to go to executors. Durie, 23d February 1628, Nasmyth *contra* Ruthvens.--- The contrary, unless there had been a charge of horning. Fountainhall, 27th February 1712, Scot *contra* Dutchess of Buccleugh.

THE town of Edinburgh being debtor, by an heritable contract, to Heriot in L. 10,000, to be paid upon requisition at three several terms; Heriot made requisition for the first term's payment, but died before the term came; the executor was found entitled to the 5000 merks payable at the first term, and annualrent effeiring thereto, in regard it became moveable by the requisition. Durie, 10th March 1630, Dr. Lindsay *contra* town of Edinburgh.

If a charge
of horning.

A BOND bearing annualrent, being payable upon a simple charge of six days, is render'd moveable by a charge of horning, and therefore found alienable upon death-bed. Durie, 24th February 1624, Donaldson *contra* Donaldson.----- A creditor having charged for a sum secured by infestment of annualrent, this was found to make the debt moveable, and to go to executors, because the charge made the debt revive, which was the price of the infestment of annualrent, and was of consequence a renouncing or passing from the infestment. Stair, Gosford, 25th June 1672, Executors of Seaton *contra* his heir.

Bond seclud-
ing executors,
if render'd
moveable by
diligence?

A DECREE for payment, taken upon a bond secluding executors, does not render it moveable, but the same will belong to the heir. Stair, 13th July 1676, Christie *contra* Christie.---- The like. 3d July 1735, Monro *contra* Monros.---- Nor was registration in order to a charge found to make such a bond moveable. Marcus (*Executry*)

February 1687, Yeaman *contra* Yeaman.---- The same was found where the creditor had gone on to charge upon his bond. Falconer, 17th January 1683, Wishart *contra* Earl of Northesk. But this interlocutor was afterwards altered, and the sum found to belong to the executors. Falconer, 1st March 1683, *inter eosdem*.---- An heritable bond being granted, without any warrant to infest thereupon, yet there being a clause therein, bearing the sum to be declared heritable, and no ways moveable in any time coming; but there being a charge of horning given upon the bond, which, *in dubio*, makes heritable sums moveable, yet the Lords thought that the foresaid clause was equivalent to a clause secluding executors, and therefore found the charge of horning did not render it moveable. Forbes, Fountainhall, 24th July 1705, Gray *contra* Panton.

Diligence
upon a com-
prising.

FOUND, That an arrestment and forthcoming at the instance of an appriser, do not make the sums in the apprising moveable. Falconer, 17th January 1683, Wishart *contra* Earl of Northesk.---- A bond being made heritable by adjudication, it was found, That a subsequent charge of horning did not make it again become moveable. 12th November 1728, Reids *contra* Campbell.

Diligence a-
gainst a cauti-
oner.

FOUND, That even a charge of horning against a cautioner makes heritable sums become moveable. Gilmour, Newbyth, Stair, 24th January 1666, Montgomery *contra* Stewart.

The last step
of diligence is
the rule.

IN a competition betwixt a relict and heir of a defunct, about a bond having a clause of infestment, wherein two debtors were bound, the fact was, That the defunct had led an apprising against one of the debtors, thereafter charged the other debtor for payment, and after the charge gave in the apprising to be allowed, the wife pled, That the charge made the sum simply moveable. Answered for the heir, That after the charge the defunct returned to his heritable right, by obtaining the apprising allowed. The sum was found heritable. Stair, Newbyth, 13th January 1665, Shand *contra* Charteris.

What if the
diligence be
null?

AN infestment of annualrent was argued to be moveable, so as to go to the executors, in respect the defunct had made requisition for the same, which requisition, tho' informal, sufficiently evidenced the mind of

of the defunct, to make the sum moveable, and go to his executor. Answered for the heir, The ground whereupon a requisition makes an infestment of annualrent moveable, is because it looses and takes away the infestment, and therefore if the requisition be null, the infestment stands. The requisition being null, the heir was preferred. Stair, Newbyth, 18th January 1665, Stewart *contra* Stewarts. See Gilmour, who says the sum was found moveable.

HERITABLE and moveable quoad husband and wife. See *Husband and Wife*.

HERITABLE and moveable quoad fiscum. See *Escheat*.

WHAT understood to be bygones, so as to become moveable. See *Term legal and conventional*.

BOND containing substitutions, when the substitution is understood to be at an end, so as to go to executors. See *Succession*.

BYGONES upon an adjudication, whether heritable or moveable. See *Adjudication*.

HERETAGE and CONQUEST.

THE second of three brothers deceasing, and having a bond payable to him, his heirs and assignies, secluding executors, the Lords found, That a bond secluding executors, was not properly, in the law sense, conquest, seeing infestment could not pass thereupon, and therefore that it fell to the heir of line. Fountainhall, Dalrymple, Forbes, 23d January 1706, Baigbie *contra* Baigbie.

A *TACK* belongs to the heir of line, albeit conquest by the defunct. Stair, 23d June 1663, Ferguson *contra* Ferguson. Hope. (*Succession*) 24th June 1625, Heirs of Earl of Dunbar competing.

A *FATHER* granted bond to his daughter, obliging himself to infest her in an annualrent of 100 merks yearly out of certain lands, and containing a power to her to call for the principal sum upon requisition, it was found, That this bond being principally conceived as an annualrent-right, tho' having a clause of requisition, did fall to the heir of conquest. Stair, Dirleton, 7th July 1675, Robertson *contra* Lord Halkerton.----An heritable bond, upon which no infestment had followed, was found to belong to the elder brother. Stair, 21st July 1676 *contra* .----The like. 8th December 1738, Menzies *contra* creditors of Menzies.---The like of a comprising, upon which no infestment had followed. Dirleton, 29th February 1677, *contra* . Gosford, 28th June 1677, Anderson *contra* Anderson.

IN the competition betwixt the Duke of Hamilton, heir of conquest of the deceased Earl of Selkirk, and the Earl of Ruglen heir of line, the Lords determined the following points, *1mo*, That the heir of conquest succeeds to dispositions and adjudications of land purchased and acquired by the defunct, and which were descendable to his heirs and assignies, albeit he was never thereupon infeft. *2do*, That the heir of conquest has right to all heritable bonds acquired by the defunct, whereupon he stood infeft the time of his decease, and were descendable to his heirs and assignies whatsoever. *3tio*, That the heir of conquest has right to heritable bonds conveyed to the defunct, tho' he was never infeft upon the conveyances. *4to*, That the right of succession to bonds including executors, and containing no obligation to infeft in lands, descends to the heir of line. *5to*, With regard to subjects, where the annualrents of heritable bonds were accumulated with the principal sums in personal bonds of corroboration, making the whole payable to the creditors heirs, including executors; found, That the bonds of corroboration do not alter the right of succession as to the principal sums contained in the original bonds, which devolved to the heir of conquest; but that all the further sums accumulated in the bonds of corroboration descend to the heir of line. *6to*, Several heritable subjects being purchased by the Earl's doers for his behoof, but taken in their own name, and the trust being acknowledged by them, found, That the right to the lands and heritable bonds being in the person of Mr. Bogle and Mr. Hamilton in trust, for the use and behoof of the Earl of Selkirk, the succession devolves to the heir of conquest. 8th January 1740, Duke of Hamilton *contra* Earl of Selkirk and Ruglen.

A RIGHT affecting an estate, conquest by the defunct, goes to the heir of the investitures. See Succession.

HEREZELD.

In what cases due.

ATENANT deceasing, whether he be mailer or farmer, whether he have tack or not, his master will get a herezeld of best quick goods. Haddington, 24th February 1610, *contra*.
 . --- Herezelds are only due when the tenant was residing and died upon the ground, and did possess, at least, *octavam partem unius davatae terrae*; [a *davata terrae* being four ploughs of land. Balfour, (*Herezeld*) Sinclair, 16th June 1547, Cutler *contra* Wauchop. --- Herezeld found due, tho' the room was set in steel-bow. Hope, (*Herezeld*) Lady Trochrig *contra* Baird. --- A herezeld cannot be demanded upon the tenant's decease, where the tack was set to him and his wife, and the longest liver, until the wife be dead also. Balfour, (*Herezeld*) 17th October 1570, Logie *contra* Howison. --- A tenant's relict continuing to bruike by tacit relocation, and thereafter remarrying, the herezeld found due upon her second husband's decease. Colvil, . --- No herezeld due by feuars, but by tenants only. Bruce, 23d June 1715, Symson *contra* Halliday. --- Herezeld regulated by custom, and due only by the tenant's heir, where such is the use

use of the barony.
M'Andlish.

July 1733, Ferguson of Auchinblane *contra*

RECEIPT of a herezeld from an eldest son of a tenant, sufficient to protect him from removing for a year after his father's decease. Du-
rie, 20th March 1629, Ld. Affleck *contra* Matthie.

Receipt of a herezeld entitles the heir to continue in possession.

HOMOLOGATION.

TAKING Instruments upon pronouncing a decreet-arbitral, is a sufficient homologation. Balfour, (*Arbitrie*) ult. July 1560, Ld. Ruthven *contra* Ld. Bamff. --- A party receiving any sum, or doing any deed in consequence of a decreet-arbitral, is barred by homologation from quarrelling the same. Balfour, (*Arbitrie*) 26th February 1566, Montgomerie *contra* Semple. --- It being alledged, That a part of the land within the kirk-yard-dyke, was within the pursuer's property; it was found, That the pursuer had homologated the right of the kirk, as to the kirk-yard-dyke, and all within it, in so far as he had buried the dead of his own family in the bounds in question. Newbyth, 26th, Stair, 28th June 1666, Ld. Philorth *contra* Lord Fraser. --- A decreet of declarator of irritancy, *ob non solutum canonem*, pronounced by a sheriff, incompetent to such processes, was found homologated by a voluntary offer of obedience; after which the vassal was not allowed to quarrel the decreet by reduction. Stair, 4th February 1671, Laurie *contra* Gibson. --- Found a sufficient homologation of a sale, made in minority, That the seller, after majority, took payment of a part of the price. Gilmour, January 1663, Rires *contra* Rires. An infant succeeding to a burden'd estate, the friends of the family sold off a part, and the purchaser applying the price for payment of debts, took a right to the same, and led an adjudication, at the same time granting backbond to restrict the adjudication to the lands purchased by him, and also thirling the said lands to the infant's mill; after majority, the gentleman whose lands were thus sold, took the benefit of the backbond, by pursuing for abstracted multures, which was found to be a homologation of the sale, after which he was not allowed to quarrel the same. January 1729, Linton of Pendrick *contra* Dundas of Manner.

Deeds directly inferring consent.

A WIFE being bound, *stante matrimonio*, and thereafter sending the money to the creditor, but the bearer bestowing it otherways; this sending, after dissolution of the marriage, was found no homologation of the bond. Gosford, 7th July 1668, Cleveland *contra* Lady Cavers. --- A decreet-arbitral being challenged by reduction, as being to the enorm lesion of a minor, one of the parties in the submission, requisition of a sum appointed to be paid thereby, was not sustained as a homologation, seeing he stopt there, and nothing followed upon it. Gosford, 14th February 1677, Duke and Dutches of Monmouth *contra* Earl of Tweddale.

Inhoat act not perfected.

Silence in
what cases it
infers consent.

ONE being pursued to restore a watch, his defence was, That in the pursuer's presence he gave it to a third party, the pursuer making no opposition or contradiction, which did imply his consent. Answered, The giving away of the watch was so subit an act that the pursuer could not prohibit, specially they being all sitting in parliament; and therefore his silence could not imply a consent. The defence was repelled. Stair, 3d July 1662, Lord Coupar *contra* Lord Pitfligo. --- In a perambulation of marches, it being alledged by the defender, That he had built a park-dyke upon a part of the ground challenged by the pursuer, *sciente & astante domino*; answered, Such a slender presumption of consent is not relevant to take away property, neither was it incumbent upon the pursuer to dissent, seeing he knew that what was built upon his ground would become his own; the Lords repelled the defence, but they thought the taciturnity might operate this much, that the builder might remove the materials of his wall, or give to the pursuer the price of the land cut off from him by the park-dyke. Stair, 8th January 1663, Nicol *contra* Hope. --- A tocher being payable to the father and son, to be imployed by the father, with so much more, on land, for the use of the son and his wife in liferent, and their children in fee; payment made to the son was sustained, being in presence of the father. Durie, 31st January 1632, Johnston *contra* Howison.

Consent can-
not be presum-
ed where the
right is not
known.

A BOND drawn in name of several apprisers to communicate their rights, and subscribed by some, was found not homologated by one who subscribed not, tho' *de facto* he concurred in pursuits with the apprisers to exclude other rights, seeing it appeared not that he knew of the bond. Stair, 6th July 1661, Telfer *contra* Maxton and Cuningham.

Facts infer-
ring know-
ledge of, and
consent to, the
right quarrel-
led.

THE subscribing as witness to a tack, was found only to be reputed a testimony of the truth of the subscription, but not to hinder the said witness to impugn the tack he signed. Haddington, 4th December 1592, Schaw *contra* tenants. Haddington, 8th July 1613, Powrie *contra* Johnston. --- Two parties contending about the property of a coal, and one of them who had obtained decreet of removing against the tacksmen thereof, subscribing witness to a tack set by the other competitor to the said tacksmen; the Lords found, That this subscribing, did not pre-judge him in his right to the coal; because, *subscribere possum ut testis, licet non vidi quæ subscripsi*. Durie, 19th July 1625, Wallwood *contra* Taylor and Earl of Dunfermling. --- This was again found, altho' in the tack there was a clause contained in the said subscriber's favours. Durie, 28th July 1625, *inter eosdem*. --- A member of a chapter having subscribed a tack set by the bishop, not as consenter, but as witness thereto; this was found equivalent to his consent. Durie, 26th July 1631, Bishop of the isles *contra* Schaw and others. --- A party mentioned in the bond as cautioner, was not found bound, tho' he subscribed as witness, unless the bond had been read over to him at the signing. Stair, 26th July 1672, Gordon *contra* Menzies. --- One subscribing as witness to a right granted by his debtor, his knowledge of the contents, and acquiescence in the deed was not thereby presumed. Stair, 1st February 1676, Vietch *contra* Pallat. --- A discharge granted by a procurator was not found effectual against the minor, tho' the minor subscribed the discharge as witness; which was not found to infer his consent. Bruce, 20th July 1715, Allan *contra* Hamilton. ---

A mar-

A married woman having granted a short ticket of six or seven lines, to which her husband subscribed as witness, so that he could not be ignorant of the contents; the Lords found his subscription as a witness, in this case, equivalent to a consent. Fountainhall, 6th January 1686, Hepburn *contra* Lady Eveleck and her husband. ---- An eldest son subscribing witness to his sister's contract of marriage (wherein she assigned to her husband, *nomine dotis*, a bond of provision, granted to her by her father, and execution was appointed to pass at the brother's instance for implement of the clauses in the said contract, conceived in her favour) with his knowledge of the assignation made by her, was found relevant to infer homologation, so as he could not as heir to the father reduce the bond as *ex capite lecti*. Forbes MS. 15th July 1714, Davidson *contra* Davidson and Wier. ---- Found, That a father's subscription to his son's contract of marriage, did imply his knowledge of the contents, and his consent of consequence to a provision made to the wife of a certain subject belonging to himself, and which the son could not grant without the father's concurrence. February 1725, Johnston *contra* Berry.

In a pursuit at a relict's instance, against the husband's heir to make up what was wanting of the liferent stipulated to her in the contract of marriage; it was alledged, That the pursuer stood infest in certain lands, upon a bond granted by her husband, bearing in full satisfaction of the contract of marriage; which right she had accepted by possessing five or six years after her husband's death, and thereby homologated the same. Answered, That the bond being a deed of the husband's, and the infestment not taken by her, but by an attorney, her possession cannot import homologation of a clause so much to her detriment, foisted into the bond, and which she is not presumed to know. The homologation was sustained; for tho' ignorance may be presumed in a wife *de recenti*, & *intra annum luctus*, yet she having continued so many years, and done so many deeds expressly as liferentrix, and that the bond was not clandestine, lying by her husband, but in a third party's hand who had taken the infestment; in that case, the Lords thought knowledge was to be presumed. Stair, 14th November 1665, Skene *contra* Ramsay.

A SPECIAL legacy of an heretable sum being left in testament, and the heir, who was named executor, confirming the same in common course; this was found not to bar him from quarrelling the legacy, seeing confirmations pass of course, without adverting to the nature of the subjects confirmed. Stair, 23d December 1673, Mitchel *contra* Mitchel. ---- In a pursuit upon a bond granted by a wife during marriage, it being alledged, That she had homologated it, by giving up the same in the confirmed testament. This the Lords repelled, it being hard to prejudice an ignorant woman, who knew no better than to follow the advice of her procurator, who gave up that debt. Fountainhall, 8th November 1677, Sinclair *contra* Richardson.

AN interdictor having subscribed a bond as cautioner only, not as interdictor, the bond was reduced as wanting his consent. Durie, 12th February 1633, Forbes *contra* Forbes. ---- Found, That subscription of a curator, not as such, but as party, did not import his consent as curator. Nicolson, (*Curators*) 11th March 1623, Lord Bargeny *contra* his children. --- A husband, being writer and subscribing witness

Legal steps
passing of
course infer
not consent:

Acting in
one capacity,
if it infer cons
sent, necessary
to be given in
another capa
city?

ness to a disposition made by his wife of her lands, found to be a sufficient consent, so as to validate the disposition. 20th December 1728, Riddel *contra* Scot. --- A Lady being nominated both tutor and curator to her son, but so as to act with the advice, consent, and approbation of five friends therein named; and they not having given any approbation; but, in lieu thereof, having subscribed as witnesses to her subscription of the accompts, after they had perused the same; the Lords refused to sustain their subscription as witnesses to imply a consent, but allowed them as yet to object against any article of the accompts, and referred to one of their number to hear them in a process of exoneration at her instance, and in case he found all the articles sufficiently instructed, then to decern in the exoneration. Fountainhall, 25th February 1703, Lady Rosehaugh *contra* her son. --- An apparent heir subscribing as witness to a death-bed-deed, was found to import his consent. Stair, Gilmour, 25th June 1663, Stewart *contra* Stewart. --- In a reduction of a disposition, as done on death-bed by a father in favours of his younger children; the Lords found this defence relevant, That the pursuer had consented, in so far as the eldest son had subscribed as witness, and knew, and heard the disposition, so that he was not ignorant of the tenor thereof. Stair, 4th, Dirleton, *ult.* July 1666, Halyburton *contra* Halyburton. --- In the question, whether the apparent heir his subscribing as witness to the deed of his predecessor *in lecto*, does not import a homologation thereof; the Lords, intending to fix a general rule as to this point, did find, after a full debate thereupon, That the apparent heir his signing as witness, ought not to import a consent, whether he knew the contents of the writ or not, and resolved to follow this as a fixed rule in time coming; and found, That the former decisions were in special circumstantiated cases, and made no general rule. Fountainhall, 13th, Dalrymple, 19th January 1704, Dallas *contra* Paul. --- A woman during her second marriage, having purchased a tenement, took the same to herself in liferent, and to a daughter of the first marriage in fee; this being challenged by the heir of the second husband, arguing, That it must belong to him as presumed conquest by his father's means; answered, That it is but a presumption, which is taken off by the husband's consent to the disposition, inferred from his giving sasine thereon as bailie. Replied, This was *actus officii*. Duplied, It naturally fell to the husband in this case to enter a protestation *salvo jure suo*, if he had not meant to acquiesce. The Lords sustained the disposition. Stair, 29th January 1668, Brown *contra* Happiland.

Consent not
presumed,
where the deed
can be ascribed
to another
cause.

A PERSON who in his minority had granted bond, being pursued for the same when he was major, proponed payment, in which he succumbed; this was not found homologation to exclude him from another defence of minority and lesion. Stair, 28th June 1665, Keil *contra* Seaton. --- Against reduction of a bond upon minority and lesion at the instance of the cautioner, homologation was pled, in so far as the reducer had pursued, and had obtained decret against the principal to relieve him, which did imply that he acknowledged himself bound. Answered, No doubt he was bound, because deeds done by minors to their lesion, are not *ipso jure* null; but he, having two ways, *viz.* an action for relief against the principal debtor, and a reduction against the creditor upon minority and lesion; chusing to insist upon the one remedy in the first place, will never infer that he has relinquished the other.

Stair,

Stair, 20th February 1668, Farquhar *contra* Gordon. Marcus, (*Minority*) 13th February 1685, Falconer *contra* ---- One having granted a bond of provision to a daughter upon death-bed, payment of some annualrents by the heir, not found a homologation, being presumed done *ex pietate* to his sister, not otherwise provided. Stair, 28th June 1671, Home *contra* Lord Justice Clerk. ----- Receiving of bonds by a minor, after majority, and getting payment, was found no homologation of a decret of exoneration at the tutor's instance, if the decret be reducible, but that the tutor will be obliged to compt *de novo*. Gosford, 11th February 1673, Caldwell *contra* Caldwell and Chalmer her tutor. ----- A minor having subscribed a bond, and suspended after majority upon a discharge granted to one who was conjunct-cautioner with him; the Lords found this did infer no homologation against him to make him pay the remainder. Gosford, 20th June 1673, Deans *contra* Crichton and her spouse. ---- It was not found homologation of a bond granted in minority, That the debtor, in compting with his tenant, gave allowance of some annualrents paid by him to the creditor, which was presumed done to save the tenant from double payment, not from any view to sustain the bond. Stair, Gosford, 14th December 1675, Mudie *contra* M'Intosh. ---- But a bond of provision being granted *in lecto*, it was sustained as an homologation, That the factor appointed in the heir's minority having paid the annualrents of the bond, the same was sustained to him as an article of discharge, and a general discharge granted by the heir after majority. Home, January 1683, Crawford *contra* Crawford. ---- A person having paid open accompts due by a minor, and got the minor's bond for the money advanced by him; and the bond being challenged after majority, upon this footing, That the accompts were exorbitant; a letter write by the debtor, after majority, excusing delay of payment, was sustained as homologation, tho' the letter did not mention the bond, but debt in general, and the defender allowed there was a ground of debt, in so far as the furnishing was moderate: But the pursuer was put to depone, That the whole accompts were paid by him without any abatement. Marcus, (*Homologation*) 13th July 1688, Somervell *contra* Earl Annandale. ---- Reduction was sustained at the instance of a dispoinee, concluding against several rights excepted out of the warrandice of his disposition, tho' it was alledged for the defenders, That their rights being acknowledged *in græmio* of the pursuers, reserved and excepted out of it, is a homologation of the same, in respect it was answered, That the exception in the warrandice of the pursuer's disposition, was not intended to benefit the defenders, but only to secure the granters from recourse. Forbes, 18th July 1710, Gibson *contra* Trotter and others. ---- A contract of marriage defective in solemnities, as being signed but by one notar, for one of the parties, was found homologated by the subsequent marriage, so as to be binding upon the spouses. Spotiswood, (*Marriage*) 6th July 1626, Cheap *contra* Mowat. Durie, 10th December 1630, Nisbet *contra* Ld. Newlands. ---- And a contract of marriage, signed but by one notar for the party, who bound himself for the tocher (probably the bride's father) was found homologated by the subsequent marriage, so as to give action for payment; and as the father had the bestowing of his daughter in marriage, the subsequent marriage might well be considered as his deed, and an act of homologation in him. Durie, 30th March

1626, Grieve *contra* Cant. ---- Nay once it was found, That the marriage of the principal parties was an act of homologation to bind the cautioner, who had bound with the husband in the contract for the wife's jointure. Stair, 1st July 1662, Breidy *contra* Breidy. ---- But the contrary was found with good reason. Durie, 30th June 1625, *contra* Gilmour, 15th December 1664, Campbell *contra* Campbell. Newbyth, 23d December 1667, Campbell *contra* M'Allan.

'Taking benefit of a reducible right, while it stands, no homologation.

A MINISTER receiving the duty of a tack of tiends against which he had an objection, as let by his predecessor, without consent of the patron, was found to be no homologation; because the tack being a standing right, the minister could get no more but the tack-duty till he should reduce the same. Stair, 27th February 1668, Chalmers *contra* Wood. ---- A bishop having changed his vassal's simple ward to tack-ward, and his successors pursuing reduction of the charter upon the act 11th, parl. 1585, and act 5th, parl. 1617, and the vassal replying, That the present bishop had homologated the aforesaid charter, by receiving the canon, which was paid yearly by the old charter, and was augmented by the new; the Lords found, That the bishop was not precluded thereby from pursuing a reduction, seeing, while it stood, he could claim no more but the canon; and therefore found it no homologation. Falconer, 12th March 1684, Archbishop of St. Andrews *contra* Bethune. --- In a reduction of a contract of marriage upon minority and lesion, it was not found an homologation, That the pursuer after she was major, had set her jointure-lands, and uplifted the rents thereof, because she was not quarrelling what she got, but what she gave. Stair, 22d November 1664, M'Gill *contra* Ruthven of Gairn. ---- There being a division made among heirs-portioners, of whom one was minor; the Lords found, That her possession of her part after majority, was no homologation, and that notwithstanding thereof she might reduce, *intra annos utiles*. Gosford, 14th July 1669, Jack *contra* Jack. ----- A tack set to a woman secluding assignies, being reducible upon her marriage, It was found, That the fetter's accepting several years rent from the husband, was no homologation to bar reduction, because, while the tenant was in possession, he could do no other than take the rent; and the accepting of it from the husband, was doing no more than taking payment of what was due to him, without any intention to pass from his privilege of reduction.

January 1734, Sir John Home of Manderston *contra* Margaret Taylor and her husband.

Homologation of a part, is homologation of the whole.

THE heir having homologated in part a legacy of an heritable bond, by allowing and discompting a part thereof: It was argued, That this could have no effect *quoad reliquum* not discompted, which was repelled, and the whole legacy sustained, tho' otherwise null. Stair, 21st February 1663, Wardlaw *contra* Frazer. ---- One upon death-bed having executed a bond of provision in favours of his younger children, payment made by the heir to some of the children, found a homologation as to the rest. Home, January 1686, Erskine *contra* Erskine. ---- A decret-arbitral being partly *ultra vires*, this nullity will not invalidate the decret so far as *intra vires*, nor will the parties obtempering the decret, so far as effectual, be understood a homologation of that part which is null. Haddington, 4th March 1607, Ld. Inchaffray

chaffray *contra* Oliphant.---- Obtempering one head of an articulat decreet-arbitral, found not to be a homologation of a separate decerniture contained in the decreet. Stair, 22d November 1662, Primrose *contra* Duy.

A HUSBAND having granted to his wife, not otherways provided, a liferent-provision, which was therefore found not revocable; yet having, *de facto*, revoked part of it, and bequeathed that part to his father; and the relict having discharged the debtor of a year's annualrent of the remainder; the Lords found this a homologation of what was left by her husband to his father, and therefore restricted her, tho' it was alledged, That homologation must be explicate and exprefs, especially against women, *in quibus ignorantia juris excusatur*; and here accepting, in the first place, of what she could get voluntarily, can never infer a presumption of her passing from a claim she could not reach but by way of process. Fountainhall, 1st December 1687, and 10th February 1688, Carmichael *contra* Corfar.

Accepting of a part uncontroverted.

ONE having made a testament, appointing his wife executrix, and leaving a considerable legacy to his daughter; and the wife having confirmed the testament, but under protestation that it should not pre-judge her own right; this was found to take off the alledgeance of homologation, and so the legacy was found a burden upon the dead's part only. Stair, 12th July 1671, Murray *contra* Murray.---- If a *protestatio contraria facto* will take off homologation, debated, but not determined. Stair, 26th January 1671, Casse *contra* Cuningham.

Protesting takes off the presumption of consent.

A SUBMISSION entred into by a wife, with regard to her heritage, null upon the act 1681, there being but one witness to her subscription, was found homologated by her husband's appearing and pleading in her behalf before the arbiters; for the husband being administrator for his wife, his consent implies her consent. 21st January 1735, Telfer *contra* Hamilton of Grange.

If homologation can be inferred from the deeds of an administrator?

A MINOR, having curators, granting a bond of borrowed money, without their consent, and having made payment of any part of the annualrent, after his perfect age, he was found thereby to have ratified the same, and that he could not be heard thereafter to impugn it. Haddington, 25th January 1611, Craig *contra* Moncrief.---- A contract subscribed by a minor without consent of curators, found homologated by a decreet of registration of the contract, obtained by the minor after his majority. Stair, 28th June 1671, Home *contra* Lord Justice Clerk.---- Payment of annualrent after viduity, found to homologate a bond granted by a wife *stante matrimonio*. Gosford, 10th December 1672, Mitchel *contra* Cuningham.---- Disposition granted by a child of 11 years of age, if capable of homologation, disputed. Home, June 1726, Harvie *contra* Gordon.

Effect of homologation. And, *Imo*, If it will validate a null deed?

A MAN's using and founding on a decreet, determining controverted marches *per modum tituli*, in actions at his instance and against him, was found no homologation of an error in fact in the said decreet. Forbes, 1st December 1711, Wauchop *contra* Hamilton.

2do, If it will validate a writ founded upon an error in fact.

WRITS defective in solemnities, if they may be supported by homologation. See Writ.

HORNING.

AN application being made by a presbytery, that letters of horning might be directed against certain persons who had been cited as witnesses, and neglected to appear before them, the Lords did demur, in respect letters of horning ought not to be directed, but either by consent of parties, or by warrant of acts of parliament, as appears by acts ordaining horning to be directed upon sheriff and commissar decreets, decreets within burgh and admiral decreets. Dirleton, 12th February 1675, presbytery of Dunse.

LETTERS of four forms discharged, and letters of horning, upon a simple charge substituted in their place. Act of sederunt 23d November 1613. See Spotiswood, (*Horning*.)

HOUSHOLD PLENISHING.

IN a process at the instance of an executor-creditor against the relict, to whom, in her contract of marriage, was disposed the half of the household plenishing, as well heirship as others, free of all debts; the Lords found, That uncut webs of cloth, not form'd into any particular use of sheets, curtains, &c. were not to be reputed household plenishing, nor yet such larger silver vessels as were kept rather for shew and ornament, than for daily use, nor medals, unless the defender offered to prove, that they were gifted to her with her other *paraphernalia*. Fountainhall, Forbes, 8th July 1709, Lady Rankillor contra Lady Ayton.

HUSBAND and WIFE.

What subjects fall *sub communione bonorum & debitorum*.

Bygones fall
sub communi-
one.

A WOMAN's jointure being established by her husband's personal obligation, to pay a certain sum to her termly, with termly failzies, and annualrent from the respective terms of payment; the Lords found the bygones of this annuity that became due before the second

cond marriage, fell under the *jus mariti* of the second husband. 23d February 1739, Dunlop *contra* Gray.

BOND bearing annualrent falls not under *jus mariti*. Stair, 28th June 1665, Pitcairn *contra* Edgar. Stair, 4th July 1676, Rollo *contra* Brownlie. --- The creditor in a bond dying after the term of payment of the principal sum, but before the first term of payment of annualrent, his relict was found entitled to draw her share thereof, the paying of annualrent being that which makes it heritable *quoad relictam*. Marcus, (*Bonds*) 26th January 1682, Barclay *contra* Pearson. --- Found, That a charge of horning on a bond bearing annualrent, does not make it so moveable as to fall either to the relict or filk, tho' even before the act 1661 it would have made it fall to executors. Fountainhall, 19th January 1693, Scot *contra* Parks.

A BOND bearing annualrent and obligation to infeft, falls not *sub communione*, nor will the relict have any part thereof. Stair, 24th June 1663, Elisabeth *contra* --- A bond heritable by a clause to infeft, assigned to a woman, her heirs and executors, found to remain heritable, and not to fall under her husband's *jus mariti*. Marcus, (*Bonds*) March 1684, Gordon *contra* Ogilvie.

A BILL of exchange is moveable *quoad* husband and wife, and falls *sub communione*, and therefore the husband is liable to pay such debts. Home, January 1725, Leslie *contra* Nicolson. --- The like, where the bill bore annualrent from its date. 13th December 1738, Gilhagie *contra* Orr.

A RELICT having paid some of her husband's debts bearing annualrent, taking a discharge, and not an assignation, her claim of relief was found to be simply moveable, and to fall under her second husband's *jus mariti*. 10th January 1736, Wilkie *contra* Balfour.

A WOMAN having assign'd a sum before her marriage, with absolute warrandice, the same was found not to fall under the *jus mariti*, tho' the assignation was not intimated, because the warrandice was a debt for which the husband was passively liable, and so he could no more compete upon his *jus mariti*, tho' requiring no intimation, than his wife the cedent could. Gosford, 6th December 1673, Robertson *contra* Lord Halkerton.

A GIFT of non-entry belonging to a woman, having *tractum futuri temporis*, falls not under her husband's *jus mariti*. Colvil, June 1582, Pennycook *contra* Cockburn.

A BOND to one, which failing by decease, to another *nominatim*, belongs solely to the substitute, and the fiar's relict can have no share of it, even tho' the institute die before the term of payment. Durie, Hope, (*Husband*) 15th January 1630, Thomson *contra* Merkland.

A WOMAN having married a second husband, who was *oberatus*, after his decease she (and not his creditors) was found to have right to the illiquid or conditional claim falls *sub communione*.

the assythment for the slaughter of her former husband, as if she had never married again. Colvil, 14th March 1579, Forbes *contra* her last husband's creditors.

THE question occurring, If the *jus mariti* did carry a conditional obligation granted to a wife, whereof the condition did not exist, nor was purified during the standing of the marriage; some of the Lords thought the existence of the condition, at whatever time it happened, did purify the obligation, and made the case the same, as if it had been pure *a principio*; but it was carried in the negative, that the *jus mariti* did no more carry an obligation, which fell due after the dissolution of the marriage, than the *jus relicte* would carry it, or the gift of single escheat, unless the condition did exist, and the same was purified before the denunciation or gift. Fountainhall, 18th December 1694, Fotheringham of Powrie *contra* Earl of Home.

Heritable debts due by the husband, burden not the goods in communion.

SEEING the relict can have no benefit of heritable debts due to her defunct husband, neither has she detriment by heritable debts due by him, and therefore the heritable debt cannot exhaust the moveables, to diminish the relict's part. Stair, 19th July 1664, Scrimzeour *contra* executors of Murray. --- The relict's third of moveables, is not burdened with any bonds due by her husband bearing annualrent. Stair, Gofford, 23d December 1668, M'Kenzie *contra* Robertson. Forbes, 27th January 1713, Moncrief *contra* Monipenny.

Nor heritable debts due by the wife.

THE Lords found a husband not liable for the principal sums of heritable debts due by his wife, whether heritable by a clause of infeftment, or by bearing annualrent, but found him liable for the bygone annualrents of the same, and in time coming, during the standing of the marriage. Fountainhall, 10th January 1696, Osburn *contra* Young. Fountainhall, 12th February 1696, Hay of Naughton *contra* Cleland and Henderson. Fountainhall, 11th January and 4th February 1704, Gordon *contra* Campbell. Forbes, 13th July 1708, Gordon *contra* Davidson.

Rents or profits of heritable subjects falling due during the marriage go into the communion.

The current annualrents of heritable sums, falling due during the marriage, do come under the communion, and accresce to the husband *jure mariti*. Stair, 28th June 1665, Pitcairn *contra* Edgar. Stair, 4th July 1676, Rollo *contra* Brownlie. Stair, 21st February 1679, Cockburn *contra* Burn. --- And the current profits of a right having *tractum futuri temporis*, arising during the marriage, fall also *sub communionem*. Colvil, June 1582, Pennycook *contra* Cockburn.

The wife's heritable subjects rendered moveable during the marriage, if they fall *sub communionem*.

REQUISITION and horning used by a married woman for her principal sum, was found not to make it moveable, so as to empower the husband to discharge it *jure mariti* without her consent, but that she or her executors might still crave it. Haddington, 11th June 1609, Ogilvie *contra* Earl Eglinton. --- Found, That a wife, having *stante matrimonio*, got right to a bond bearing annualrent, the uplifting of the money to reemploy it in her own name, did not make it fall under the husband's *jus mariti*. Marcus, (*Stante matrimonio*) 17th December 1687, Janet Stewart *contra* Gillies. --- A husband pursuing for exhibition and delivery of a bond, lent out by his umquhile spouse, which therefore must be presumed to be out of his means. Against delivery it was pled by an assigney from the wife, That this bond came in place of

of an heritable bond due to the wife before her marriage, which she had uplifted; the Lords found it relevant, That the wife had an heritable bond before her marriage, and found that her uplifting thereof, being again reemployed heritably, did not make it fall to the husband as moveable. Stair, Fountainhall, 21st February 1679, Cockburn *contra* Burn.----An heritable sum which belonged to a woman before her marriage, being uplifted by her during the marriage, and lent out again to her and her husband in liferent, and his heirs in fee; after the husband's decease, the wife laid claim to the bond as a *donatio inter virum & uxorem*, revocable by her. It was answered, That the money being uplifted became moveable, and fell to the husband by law, not by any voluntary conveyance from the wife; the Lords found the sum uplifted upon the wife's discharge, fell under the husband's *jus mariti*, unless she could make it appear that it was uplifted to be reemployed otherwise than in terms of the new bond. Marcus, (*Contracts of Marriage*) Fountainhall, 12th February 1686, Lady Garvel *contra* representatives of Forrest.----A daughter having insisted in a reduction of a disposition of lands by her father, as done without any onerous cause, in prejudice of a settlement in her favours; the Lords found it in part onerous, and refused to reduce, but ordered the defender to give bond bearing annualrent to the pursuer, for what was wanting of a just price. The disposition was made, and bond granted during the daughter's marriage, which gave rise to the question, Whether this bond fell under the *jus mariti*? That it fell under was contended, because all bonds are moveable before the term of payment; and if this bond was once moveable during the marriage, it of consequence fell to the husband, and could not cease to be his, tho' afterwards it bore annualrent. It was contended on the other hand, That the bond came in place of land, and was the same as if the wife had sold her heritage during the marriage, and taken a bond for it, which unquestionably would be exempt from the *jus mariti*; had indeed the marriage intervened betwixt the date of the bond, and the term of payment, more might be said, for that would be the same case as if a bond had been taken as the price of land sold before the marriage. The Lords found the sum heritable. January 1719, Hill of Ibrox *contra* King.

A LEGACY left to a married woman falls to her husband. Hope, (Executor) 18th January 1614, Lawson *contra* Bannantyne. --- A sum assigned to the wife, was found to become the husband's *jure mariti*, tho' not intimated by the wife till after his death; and the debtor being charged for the sum by the relict, was found to have compensation upon debts due by the defunct husband to him. Stair, 29th January 1663, Scot *contra* Dickson. --- A bond granted to a wife payable the first term after her father and mother's decease, with annualrent from that term, in case the principal sum were not then paid, was found moveable before the term of payment, and to belong to the husband and his executors, tho' he died before his wife and before the term of payment. Durie, 15th June 1627, Nicolson and Lyle *contra* Lyle. A bond granted by the purchaser of an estate to one for the use and behoof of the seller's wife, as the ordinary compliment called the Lady's gown, given for her consent to the sale and for renouncing her liferent infestment upon the lands, was found not to fall under her husband's

husband's *jus mariti*. Forbes, 26th, Fountainhall, 27 July 1709, Lady Pitfirran *contra* Wood.

Money lent
or given by a
wife, presum-
ed to be the
husband's.

MONEY lent or deposited by a wife during the marriage belongs to the husband, and he may pursue for it in his own name. Durie, 17th November 1635, Fenton *contra* Carnegie. -- Mr. Rigg's Lady having granted bond to Enterkine's lady, on the narrative of borrowed money, of which bond she made afterwards payment; the Lords found, That the money which Mr. Rigg's lady paid to the lady Enterkine, was Mr. Rigg her husband's money; and that therefore action of repetition was competent to Mr. Rigg for the same, tho' it was argued to be against equity that a husband should be entitled to repeat when he is not able to condescend upon any of his money intromitted with by his wife, at that, or any former time. 30th January 1727, Rigg *contra* Cuningham.

Goods pecu-
liar and perso-
nal to the wife,
that fall not *sub*
communione.

THE wife's *paraphernalia* fall not *sub communione*. Colvil, June 1582. Mrs. of Gray *contra* the Master.--- Nor can they be poinded for the husband's debt. Haddington, 23d and 27th June 1710,

contra. A woman gifting away her *paraphernalia* upon death-bed, and the same being quarrelled by her heir, as in his prejudice, by laying the burden of the moveable debts upon him; the Lords sustained the donation, seeing *paraphernalia* are not subject to the heir's relief of moveable debts, as other moveables are. Falconer, 27th February 1683, Earl Leven *contra* Montgomery.

FOUND, That gold gifted to a wife, even before marriage, not being *ornamentum muliebre*, might be affected by the diligence of the husband's creditors; but if extant at the wife's decease, does belong to her executors without division. Marcus, (*Contracts of marriage*)

March 1684, Craig *contra* Montieth. Hence it may be inferred, That if such gold be evicted by the diligence of the husband's creditors, it ought to be refounded by him to the wife's executors.--- The wife's jewels not falling under *communione*, cannot be attached for her husband's debts. Haddington, 27th June 1610.--- Gold medals gifted by the husband before marriage, fall not under the division of moveables betwixt husband and wife. Fountainhall, Forbes, 8th July 1709, Lady Rankeilor *contra* Lady Ayton. --- Found, That under *paraphernalia*, peculiarly belonging to the wife, and noways entering into the communion of goods betwixt the husband and her, are comprehended the *mundus* or *vestitus muliebris*, viz. all the body wearing clothes belonging to the wife, acquired by her at any time, or whatever other ornaments, or other things, peculiar or proper for her person, and not proper for mens use and wearing, as neck-laces, ear-rings, breast-jewels, gold-chains, bracelets, &c. That under child-bed linens, as paraphernal, are to be understood the linens on the wife's person in child-bed, but not the linens on the child itself, nor on the bed, nor in the room; and therefore the child's whistle, the spoon, porringer, &c. are not paraphernal, but fall under the communion of goods; That ribbons cut or uncut, are paraphernal, and belong to the wife, unless the husband be a merchant. Found, That all other things, which are of their own nature of promiscuous and common use to men and women, are not *paraphernalia*, but fall under the communion of goods, unless they become peculiar and paraphernal by the gift and appropriation of the husband to her, such as a marriage-watch, rings, jewels,

jewels, and medals, &c. But found, That a purse of gold or other moveables, that by the gift of the former husband became paraphernal *exclusive* of the husband, are only to be reckoned as common moveables *quoad* a second husband, unless of new gifted and appropriated by him to the wife. Found, That such gifts and presents as one gives to his bride, before, or on the day of the marriage are paraphernal, and irrevocable by the husband, and belong solely to the wife and her executors : But that any gifts given by the husband to his wife after the marriage-day, are revocable, either by the husband's making use of them himself, or taking them back during the marriage ; but if during the marriage the wife be in possession of them, and at her death, they are not revocable by the husband thereafter. Lastly, found, That cabinets, coffers, and other things for holding the *paraphernalia*, are not paraphernal, but fall under the communion of goods. Fountainhall, 4th December 1696, and 15th of January 1697, Dicks *contra* Massie. --- A lady pursuing for her jointure, it was referred to her oath that she had intromitted with as much of her defunct husband's effects as would pay her all by-gones ; and she acknowledging, That she had, at the dissolution the marriage, a purse containing diverse medals and purse-penies, given by her husband and other friends to her, in which number there were some guineas ; and that she had at his death about *L.* 40 sterling of lying money, being presents paid by the tenants to the family, which the Ladies ordinarily lifted for the use of the house ; and that such as were not paid in kind, were paid in money, and that her husband allowed the same to her ; the Lords found, That the Lady had right to the said purse, and that it did not belong to the husband or to his heir : But as to the second part of the oath about the *L.* 40 sterling of presents, seeing it was acknowledged, That they used to be applied to the use of the family, they found it belonged to the husband, and sustained the compensation *quoad* that, the quality of the oath being extrinsec. Fountainhall, 27th June 1712, Countess of Bute *contra* the Earl her step-son.

A HUSBAND may renounce his *jus mariti*, in so far as it relates to his interest in his wife's moveables ; but he cannot renounce it in so far as it relates to his administration and government of the family, which would be *contra bonos mores* and ineffectual. Newbyth, Stair, 9th February 1667, Lord Collington *contra* Lady Collington. --- A contract of marriage providing, That the means and estate of either party should return to themselves failing children of the marriage, and should not be under communion, was sustained, tho' it was pled to be contrary to the *jus mariti*, which it was alledged the husband could not renounce. Stair, Gosford, 30th June 1670, Greys *contra* Weemyss. --- A man in his contract of marriage with a widow, having renounced his *jus mariti* as to her jointure, and after the marriage pursuing mails and duties against the tenants ; the Lords found, That the renunciation before the marriage, accresced and returned back to the husband upon the consummation, unless it had been assigned to a third party before. Fountainhall, 12th, Stair, 13th July 1678, Nicolson *contra* Inglis. Fountainhall, Forbes, 14th July 1709, Vallange *contra* M'Dowal. Falconer, Marcus, (*Liferents*) 11th January 1682, Sandilands *contra* Campbell. Marcus, (*Contracts of marriage*) March 1682, Trotter *contra* Campbell. --- But now it seems to be generally agreed, That

jus mariti, if it can be renounced.

the husband in the contract of marriage may renounce his *jus mariti*; and that the reservation, tho' not exercised by the wife in favours of any third party, does not fall *sub communione*; and so found. 23d June 1730, Walker *contra* creditors of her husband.

Husband how far liable for his wife's debts contracted before marriage?

Liab. to all
personal debts
contracted be-
fore marriage,

THE husband is liable indefinitely for moveable debts due by his wife before the marriage, without regard, whether any thing came by the wife or not: For by our law there is an universal society of moveable goods and debts betwixt man and wife. Home, December 1682, Sympfon *contra* M'Clellan. Bruce, 19th February 1715, Inglis *contra* Harvie.

And to the
current an-
nualrents of
heretable debts
during the
marriage.

THE same with regard to annualrent of heretable debts falling due during the marriage. Fountainhall, Forbes, 13th July 1708, Gordon *contra* Davidson.

Liab. to he-
retable debts,
contracted be-
fore marriage,
*in quantum lu-
cratus.*

THE husband found liable for his wife's heretable debt contracted before the marriage *in quantum lucratus*; but in regard he had not present access to the *lucrum*, the tocher being liferented by another, the Lords ordained him and his wife to assign the creditor to as much thereof, to take effect when their right should commence, by the liferenter's death. Fountainhall, 23d January 1708, Leslie *contra* Wallace. --- A husband who got made over to him in the contract of marriage all that belonged to his wife *per aversionem*, found liable to pay an heretable debt contracted by her before the marriage; for a husband cannot, lawfully, take a right to all his wife's effects without being liable to all her debts. 24th January 1738, Dick *contra* Cassie.

When under-
stood *lucratus.*

THE husband found not *lucratus*, by getting a competent tocher, which he recompensed by suitable provisions to the wife and children of the marriage. Forbes MS. 1st, 22d January 1714, Lockhart of Carnwarth *contra* Dundaffes.

Liberated
from his wife's
moveable
debts by dis-
solution of the
marriage.

A DECREE obtained against a wife, and her husband for his interest, was found not to give execution against the husband after divorce-ment, specially it being by the wife's fault, but found that it must be executed against herself only. Haddington, 23d June 1612, Kinloch *contra* the executors of the sheriff of Murray. --- A pursuit being intended against a married woman, and her husband for his interest, for her intromissions before marriage, and the wife dying during the dependence, after litiscontestation, the Lords found, That the man being only called for his interest, *qua* husband, the relation was loosed by his wife's death, and there remained no longer any *medium* upon which to found a conclusion against him. Stair, 11th July 1664, Dunbar *contra* Fraser. --- A decree of registration obtained against a wife, and her husband for his interest, cannot be put to execution against the husband after the wife's decease. Stair, Dirleton, 23d December 1665, Burnet *contra* Lepers. --- Upon a decree recovered against a woman before her marriage, she being charged, and her husband for his interest, and

and both of them afterwards denounced, and then she dying, the husband, in a suspension, was found liberated from all further diligence. Durie, 20th March 1627, Knows *contra* Kneeland. ---- Upon a decret recovered against a wife, and her husband for his interest, horn-ing, denunciation and arrestment followed, but the wife dying, *in cur-su*, before the diligence was completed by poinding or decret of forth-coming, it was objected by the husband, That by the death of either party, the universal society of moveable goods and debts is dissolved, after which there remains no foundation for making the husband liable, unless the creditor had established a *nexus* upon his person, by obtain-ing a bond from him, or a *nexus* upon his goods, by poinding, &c. the Lords found, That seeing poinding or decret of forthcoming did not proceed during the marriage, the husband was free. Stair, 23d January 1678, Wilkie *contra* Stewart. ----- A husband after his wife's death cannot be wairded for debt contracted before the marriage, and if he be in waird therefor, before her decease, he will be set at liberty. Haddington, 26th February 1623, Douglas *contra* Stirling. ---- A husband being charged, upon a debt of his wife's, for his interest, and denounced, and his escheat thereby falling, found that the wife's death did not annul the escheat once fallen, because the contumacy in-curred by not paying or suspending *debito tempore*, the cause of the e-scheat's falling, was not taken away by the dissolution of the marriage. Stair, 25th February 1668, Laird Almond *contra* Dalmahoy. Stair, 23d December 1673, *inter eosd.* ----- Whether an adjudication led a-against the husband's lands for the wife's personal debt, contracted before the marriage, ought to fall upon dissolution of the marriage, and the husband and his estate be free, debated, but not determined. Foun-tainhall, 16th November 1698, Bryson *contra* Menzies.

A HUSBAND liable for his wife's debts, even after dissolution of the marriage, in so far as he enjoys her means *jure mariti*, because the *jus* ^{Unless he be} *mariti* is understood to be free gear only, *deductis debitis*. Gilmour, 25th January, Stair, 1st February 1662, Cuninghame *contra* Dalma-hoy. ---- If a husband get more with his wife than an ordinary and com-petent tocher effecting to his circumstances, he will be liable for his wife's debt after dissolution of the marriage, *in quantum lucratus est*, and the *lucrum* will be considered to be the benefit he has gotten above an ordinary tocher. Stair, Dirleton, 23d December 1665, Burnet *con-tra* Lepers. Stair, 27th January 1674, Spreul *contra* Stewart. ^{*lucratus* by the marriage.}

A HUSBAND, after his wife's death, was pursued for the price of wines sold to the wife immediately before the marriage, upon this *me-dium*, That the property and possession falling to the husband by the marriage, he must be liable for the price, especially having allowed his wife, as *præposita negotiis*, to sell some part thereof. The defence was, That the marriage having dissolved within three or four months, the property of the wines was not the husband's, but returned to the wife's executors, so that he could not be liable, but for what was actu-ally sold during the marriage, which was found relevant. Gosford, 24th, Stair 25th November 1668 Andrew *contra* Carse. ---- A woman being pursued as universal intrometter to a defunct, and her husband *pro interesse*, and the wife dying, the Lords found, That the husband not being otherways *lucratus* by the marriage, should not be liable, un-less

less it was proved, That he got the goods intromitted with by his wife, Dirleton, 10th February 1676, Mackail *contra* M'Millan.

And even
then *subsidi-*
rie only.

A WOMAN tutrix to her son having married a second, and then a third husband, and the said third husband and she being both conveyed, first for her intromission during the standing of the second marriage, and then also for what she had lifted as tutrix before that second marriage; the Lords found, That the third husband could not be conveyed for his wife's or her second husband's intromissions during that marriage, until the heirs of the second husband were first discussed; and as to the years that preceeded her second marriage, found, That the third husband and she might be conveyed for her intromission during these years, and that it was not necessary to pursue the representatives of the second husband for the same, seeing the action was proper against herself, she being then tutrix, and consequently against her present husband. Durie, Spotiswood, (*Tutor*) 28th March 1629, Matthieson *contra* Ld. Waristoun. --- A husband being pursued for the price of moveables intromitted with by his wife, alledged, That her former husband had got these moveables, and his successor should be liable, at least, in the first place, which was repelled, but prejudice to the present husband to pursue the successors of the former husband for repetition as accords. Stair, 18th February 1663, Dunbar *contra* Lady Frazer --- After the wife's death, the husband, tho' decret was taken against him, is not liable for her debts, tho' he be *lucratus* by the marriage, until her representatives be first discussed. Stair, 23d January 1678, Wilkie *contra* Stewart. --- A husband being convey'd for payment of his defunct wife's moveable debts, *in quantum factus erat locupletior*, the Lords found the husband liable *subsidiarie* only, the heritable estate being first discussed and exhausted, in regard that the *jus mariti* being equivalent to an assignation *inter vivos*, the creditors could have no ground of quarrel, so long as there was sufficiency remaining for their payment. Falconer, 27th February 1683, Earl Leven *contra* Montgomery.

Mutual duties betwixt husband and wife.

Husband
bound to ali-
ment and pro-
vide for his
wife.

A MAN putting away his wife for an alledged fault, it was found, That he ought to maintain her, conform to his estate, from the time of his putting her away till reconciliation or sentence of divorce. Balfour, (*Husband*) 26th February 1561, Crichton *contra* Abercromby, 26th March 1561, Logan *contra* Wood. --- During the dependence of a process of divorcement for impotency, altho' the pursuit was at the wife's instance, yet in the mean time the Lords found she was to be alimented at her husband's charges. Colvil, 23d March 1579, Lady Lennox *contra* Lord Lovat. *Nota*, This was so decided, altho' the husband offered to receive her home.

A WIFE's bond for 600 merks, without consent of her husband, found binding upon him, she being *persona illustris*, her husband out of the country, and therefore the bond presumed to be for aliment. Hope, (*Husband and Wife*) 8th June 1613, Russel *contra* Earl of Argyle.

THE husband is liable for goods taken off by his wife, even after inhibition, unless he can prove, that she was otherwise competently provided.

vided. Stair, 25th July 1676, Campbell *contra* Ld. Ebdn.----The like. Gosford 23d June 1675, Auchinleck *contra* Earl Monteith.

A HUSBAND found liable for marriage clothes taken off by his wife, after proclamation of banns, upon this footing, That they were in *rem ejus versum*; for if the wife had wanted, the husband must have provided her after the marriage. Stair, 10th July 1672, Neilson *contra* Guthry. ---- A minor found liable for his wife's wedding-clothes taken off by himself: For tho' the father may be liable to furnish wedding-clothes with his daughter, yet if the furnishing be upon the husband's faith, it is surely *in rem versum* of him, and he may *age* as accords against his father-in-law. Fountainhall, 24th June 1696, Henderfon *contra* Lafreis.

AFTER some mistakes betwixt a lady and her husband, she falling ill, and being advised by physicians to go to the bath for her health, and her husband having gotten declarations from other physicians, That medecines used at home might as possibly recover her; and so upon his refusing his consent to her going abroad, he being required by way of instrument to furnish her money for her journey, but still declining, and two near friends having advanced her a sum for that purpose, taking her bond for it; and thereupon, with her concurrence intending process against him for repayment; the Lords found the bond null, as granted *stante matrimonio*, without the husband's consent, and found, That she could not desert her husband's family; yet if her sickness required it, and his fortune could bear it, that he was obliged to promote the cure, altho' it were by going to the bath, or other medicinal waters; and therefore sustained the process at her instance against her husband, in so far as the money was necessarily advanced on her journey to England. Fountainhall, 19th July 1711, Lady Kinfawns *contra* Ld. Kinfawns.

WHERE the husband is willing to aliment his wife in his own family, she is not entitled to a separate aliment, unless she prove *sevitiam* or maltreatment, Fountainhall, 19th July 1711, Lady Kinfawns *contra* Ld. Kinfawns.

THE creditors of a husband having attached his whole funds by legal diligence, and particularly a considerable *jus mariti* he had in his wife's effects; the wife insisted for an aliment against them, and pleaded, That her husband's obligation to aliment her, was the reciprocal cause of the legal assignation from her to her husband; and therefore, as he could not touch her effects without performing the mutual cause, his creditors could be in no better situation, the right must pass to them with its burden. Answered, The *jus mariti* and husband's obligation to aliment his wife, are quite independent of one another; in so much, that the obligation to aliment is the same, whether the husband has any benefit by the marriage or not, and his *jus mariti* is the same, whether he be bound to aliment his wife or not, as where she is provided in an aliment *aliunde*; and as this obligation to aliment is not fixed and ascertained like a bond of borrowed money, but variable and fluctuating with the means and circumstances of the parties, the husband is liable only *secundum vires*, and when bankrupt not at all. The Lords assailed from the claim of aliment. Fountainhall, 10th November 1687, creditors of Newgrange *contra* Scot. Fountainhall, 18th July 1700, Lady Panholes *contra* her husband's creditors. Foun-

Unless he
be insolvent.

tainhall, Forbes, 25th November 1709, Turnbull *contra* her husband's creditors. February 1732, Gibson *contra* her husband's creditors.

--- A wife's father who is debtor in the tocher, having alimanted her after her husband was broke and gone off the country, was found to have retention of the bygone aliment against the husband's creditors arresting, and insisting in a forthcoming of the tocher; but retention was not sustained in time coming. Fountainhall, 11th June 1712, Robertson *contra* Robertson.

The wife if maltreated may withdraw, and is entitled to a separate maintenance.

A WOMAN having diverted, and being decerned to adhere, if she alledge *ſævitiam mariti*, and make faith, That she dreads him bodily harm, this will be a good ground of suspension of his decreet, until he shall find caution to treat her as becomes a good husband. Haddington, 18th June 1594, Howison *contra* Rae. --- In a process of adherence, at the instance of a person of quality against his lady, she defending upon maltreatment; the general heads whereof were, the refusing to allow her money for her necessary uses, the debarring her from the oversight of the education of her children, especially her daughter while young, the shutting the doors of his lodging, and keeping her out at night, and turning off a servant for opening the same, his scandalous and familiar converse with her woman, and protecting her after the defender had discharged her from the house, &c. These articles having been repelled by the commissaries, the Lords at advising a bill of advocacy, found, That the commissaries had done iniquity; and therefore passed the bill. Fountainhall, 8th June 1697, Dutchess of Gordon *contra* the Duke. --- Cassie elder of Kirkhouse, in the year 1715, was attainted of high treason, and his estate was adjudged to his son, upon this *medium*, That it being a tailzied subject, the father had incurred the irritancies, and fallen from his right before his rebellion. The lady Kirkhouse, spouse to Kirkhouse elder, in her contract of marriage was provided to the liferent of 1000 merks, to take place after her husband's decease; but after the fee was established in her son, having insisted against her husband for a separate aliment upon the head of maltreatment, she not only obtained her son to be made liable for a separate aliment, but likewise, upon a clause in the act 1661, obtained, That the adjudgers upon the estate should be obliged to restrict themselves to their annualrents during the legal, that there might be room for her to affect the rents of the estate for that aliment. November 1728, Lady Kirkhouse *contra* her husband, &c.

A WOMAN having first brought a proof of her marriage, and then pursuing for adherence, it was sustained as a defence, That, since the time of the alleged marriage, she had been guilty with another man, which in law would dissolve a marriage tho' formal and solemn, much more a clandestine marriage, inferred by presumptions; and here the Lords refused to oblige the pursuer to raise an action of divorce, yet seeing this might be obtruded against every action for adherence, they appointed the defender to pay in a sum for an *interim* aliment, and to carry on the process, with certification if he succumbed, they would consider it as a calumnious defamation. Fountainhall, 23d February 1700, Cook *contra* Johnston.

The husband if bound to provide his wife in a jointure.

IN a pursuit at the instance of a wife against her husband, that in respect he had married her very young, without a contract, or advice of friends

friends, and got 12000 merks of portion with her, and was delapidating his fortune, he might be decerned to secure a liferent to her, and provisions to her children; the Lords found, That the defender could not be so decerned, but the pursuer must rest upon her legal provisions of terce and third. *Harcus, (Contracts of marriage)* December 1686, Mrs. Borthwick *contra* Dr. Borthwick. --- A young woman having married against her father's consent and without a contract, her husband's creditors arrested her tocher of 8000 merks, in the father's hands as belonging to their debtor *jure mariti*, and pursued a forthcoming; alledged for the defender, A husband who gets a tocher with his wife, is bound to provide her in a suitable jointure; and therefore retention must be competent for security. Answered, Marriage is a legal assignation, which effectually transmits the right of moveables, without any implied condition; and the wife, by marrying without a contract, made her choice of the legal provisions of terce and third; and tho' the husband had no effects, he might acquire, and *utcumque* the tocher must be his, tho' there should be no subject out of which to draw a terce or third, as, on the other hand, she would be entitled to a terce and third, tho' she brought no tocher; the Lords considered this as a new case, and found the tocher belonged to the husband, but with the burden of a jointure to the wife, not exceeding the annualrents of the tocher; and therefore decerned in the forthcoming, the arresters finding caution to pay her the annualrents of the said sum yearly, in case she survived her husband, and was not otherwise provided by him in a jointure. *Harcus, (Contracts of marriage)* Fountainhall, 10th November 1687, creditors of Ogilvie of Newgrange *contra* Scot of Hetherwick.

ALTHO' a defunct's family be kept at his own house till the next term after his decease, yet the Lords found, That the relict was free to live where she pleased, and allowed her a modification for her entertainment, proportioned to the liferent provision, tho' she liferented an annualrent the payment of which commenced at the next term. *Gilmour, Stair, 1st February 1662, Couper contra* Ld. of Tofts. --- A Lady, who, in lieu of her jointure, had a bond for a great sum from her husband, payable at the term after his decease, craving aliment for maintaining the family for five months, from his death till the next term; the Lords found an aliment due to her, notwithstanding her said bond, tho' here the reason of granting such aliment seemed to cease. *Fountainhall, 15th January 1709, Lady Ormiston contra* Hamilton of Bangour. --- The extent of a relict's jointure was found not to be the rule of alimentering the defunct's family, till the term after his death, but the quality of the person and condition of the family left by him. *Forbes, 15th July 1713, creditors of Scot contra* his Lady. --- How much is to be allowed to the relict for aliment till the term, is arbitrary, according to circumstances; the jointure is not the rule, nor was a separate aliment found to be the rule, which she had complied with rather than live with her husband; but, in respect to the circumstances of the estate, the Lords, in the present case, allowed her only a proportion of the separate aliment, unless she should shew cause from the circumstances of the heir for a larger allowance. 18th November 1737, *Boswell contra* Boswell.

Relict's aliment till the term after her husband's decease.

Mourning. THE husband's representatives are liable for the relict's mournings. Stair, 12th November 1664, Murray *contra* Nielson. Stair, 7th July 1675, Wilkie *contra* Morison.

Expences upon the birth of a posthumous child. A RELICT is intitled against her husband's representatives to the expence by the birth of a posthumous child. Stair, 10th November 1671, Hafty *contra* Hafty. Fountainhall, 19th February 1706, Lady Braidisholm *contra* Braidisholm.

Husband and wife's funeral expences. IT being alledged by a relict, That the defunct's funeral expences could not affect or diminish her part of the moveables, because the communion of goods, can be burdened with no debts, except what were contracted during the standing of the society, whereas funeral charges is a debt contracted after dissolution of the marriage; the Lords found nevertheless, That the relict's part must bear a share of the funerals as well as the dead's part belonging to the nearest of kin. Fountainhall, 19th June 1708 *contra* Forbes, 20th June 1713, Moncrief *contra* Monipenny.----The like, with regard to the wife's funeral expences, where she predeceases. Fountainhall, 14th February 1696, Dicks *contra* Maffie. Marcus, (*Executry*) 8th January 1685, Monteith *contra* his sisters-in-law. 24th July 1735, Learmont *contra* Watson of Saughton.----The contrary. Forbes, 16th January 1706, Aitkin *contra* Guidlet.----A wife dying within the year, in a process for repetition of the tocher, the husband was allowed to deduce her funeral expences. Stair, 23d February 1681, Gordon *contra* Inglis.

A PERSON whose escheat was gifted, dying unrelaxed, the donatar, as succeeding to his moveables by a lucrative title, and who had also obtained from the defunct a lucrative disposition of his lands, found liable for the expence of his funerals, and not the relict, tho' provided in a jointure. Marcus, (*Escheat*) March 1683, Marquis of Montrose *contra* Ld. Buchananan's relict.----A relict dying without having any means or estate to defray her funeral charges, the heir of her deceased husband, tho' a remote relation, was found liable. Falconer, Marcus, (*Aliment*) November 1681, Home, March 1682, Heriot *contra* Blyth.

Husband's powers with regard to management of the common stock.

Administration of the goods in communion. THE husband has power to dispose of the moveables in communion, to take effect in his life or after his death, provided it be exercised *sine dolo*, but a bond being granted to a niece, payable after the death of the granter and of his wife, *in case he left no heirs of his own body*, the Lords found the circumstances of fraud here alledged, *viz.* That at the time of the bond, the granter had not an estate sufficient to satisfy the bond, leaving any thing considerable to his wife, not other wife provided, and that the bond bore a condition of not having heirs of his own body, relevant to this effect, That the bond should not affect the wife's half. Stair, 8th, Dirleton, 9th December 1675, Thomsons *contra* creditors of Alice Thin.----A man having disposed to his brother the whole sums and goods he should have at his death, "if he survive him, and the

the disponent have no children of his own; " the Lords found, That this could not disappoint the wife of her legal interest in the goods in communion. Stair, 10th January 1679, Grant *contra* Grant.

A LADY who had deserted her husband *ob sævitiam*, and gotten a separate aliment by the Lords, now craving that her son, who was her only child might be taken from his father, and given to her in custody, because of his tenderness, and his father's neglect of his education, offering also to maintain him out of her aliment; the Lords, in regard the son was past infancy, judged that the father had the only right to keep and educate him, and therefore refused her bill. Fountainhall, 6th July 1708, Lady Innergellie supplicant. Management of the children.

Husband curator to his minor wife.

A WOMAN minor marrying, and her husband, a poor Highlandman, demanding up a sum belonging to her, the Lords found her sufficiently authorised by her husband as curator to her, and that the right of administration, & *jus exigendi*, was in him, and that the chance of the marriage its dissolving within the year, did not hinder his uplifting, tho' he were worth nothing. Fountainhall, 30th July 1697, corporation of the taylors in Canongate *contra* Daikers.

A married woman's deeds in what cases effectual against herself, the husband consenting or not consenting.

FURNISHING to a family, tho' received by the wife, claimed from her after her husband's decease, found to be *in rem versum* of the husband, who was bound to aliment his wife, and therefore she was as-soilzied, reserving action against the husband's representatives. Durie, 12th March 1630, Scougal *contra* Douglas.----In an action against a widow Lady for meal and malt furnished to her in her husband's time, when he was absent at court; the Lords refused to burden her with the payment thereof, altho' it was alledged, That she had a factory from her husband in the time, giving her power to uplift his rents, pay his debts and transact the same, and generally to do all his business. Spottiswood, (*Husband*) 18th March 1631, Howison *contra* Lady Lauriston.----A wife was not found liable for a sum furnished to her for her aliment in her great necessity, leaving the creditor to insist against the husband; and this, tho' the money was advanced to her upon her own faith, which can make no difference; for if she be not bound otherwise, her promise, or even personal bond granted *stante matrimonio*, cannot bind her. Durie, 21st December 1629, Ayton *contra* Ld. Halkerton.----A married woman found liable for her wedding-clothes, taken off by herself before the marriage; for tho' this furnishing was *in rem versum* of the husband, and not of the wife, yet here she was bound by her own contract, entred into before marriage. Stair, 10th July 1672, Nielson *contra* Guthrie.----A married woman giving a bond for goods, alledged furnished to her without her husband's concurrence, and being pursued after her husband's decease, action was sustained for so much only as she acknowledged she had received; Furnishing to a wife, and imo, Where the husband is bound to aliment.

and it was found that she had no relief against her husband's representatives for the same, unless in so far as bestowed upon the use of the family. Haddington, 6th July 1610, Eustachius's wife *contra* Lady Halyroodhouse.

2do, Where
she has a separate
aliment.

A WIFE liable for drugs furnished to her and her children at her desire, she having a peculiar estate left by her father for her aliment, wherefrom her husband was excluded, and he at the same time was bankrupt, and out of the country. Stair, 19th December 1667, Gairns *contra* Arthur.---- A lady being settled in a separate aliment, any furnishings made by merchants, &c. to her, found to bind her personally, and to affect her aliment. Marcus, (*Stante matrimonio*) 6th July 1688, Robin *contra* Countess of Southesk.

3tio, Where
the husband is
bankrupt.

PROCESS for the price of wines was sustained against a woman clothed with a husband, and he not called, because the husband had been ten years out of the country before the pursuit, and was not returned, nor was it known whether he was dead or alive, and all this time the defender was in use to bargain with this pursuer, and buy wines and keep an inn. Durie, 19th March 1626, Ruffel *contra* Paterson.---- The like. Haddington, 19th January 1611, Hog *contra* Lillie.---- A married woman who had entertained boarders *proprio nomine*, for the space of 15 years, her husband being absent, and reported to be dead, was found personally liable for what was furnished to the family and boarders. Gilmour, 23d June 1663, Hay *contra* Carstorphin.

Her personal
bond for
borrowed money
not binding, tho' the
husband consent.

A PERSONAL bond for borrowed money, granted by a woman *stante matrimonio*, is not effectual against her in law; and it does not alter the case, whether she be principal or cautioner, or whether her husband consent or not. Haddington, 12th June 1611, Wood *contra* Lady Bonington. Durie, 24th March 1626, Greenlaw *contra* Galloway. Durie, 19th December 1626, Matthew *contra* Sibbald.---- Nor will a judicial ratification upon oath, give any support to such a bond. Gilmour, 14th January, Stair, 18th February 1663, Birch *contra* Douglas. Newbyth, 27th January 1665, Fisher *contra* Ker. Dirleton, 5th July 1676, *contra* Fountainhall, 11th February 1707, Broomfield *contra* Simpson, &c.---- The like, tho' the creditor offer to restrict his bond to be the foundation of real diligence only against the estate. July 1730, Lithgow *contra* Armstrong.---- A wife who had a considerable aliment modified her by the privy council, for entertainment of her husband and family, whereof the whole managry (because of the husband's weakness) was committed to her, and her discharges declared sufficient, having granted bond for borrowed money during the marriage; the Lords, tho' the validity of the marriage was much doubted, by reason of the husband's natural fatuity, yet refused to recede from the known principle of law, and found her not liable for the sum. Fountainhall, Forbes, 15th November 1705, Duncan *contra* Lady Drum.---- An apprising led upon a bond of borrowed money, granted by a husband and wife, found null, tho' it was argued, That a woman, with her husband's consent, can bind herself effectually to grant a security upon her lands; and her subscribing the bond, tho' it cannot bind her personally, must at least be equivalent to a consent, that the creditor, upon the husband's obligation, should have access to apprise her lands. Durie, 30th January

January 1635, Mitchelson *contra* Moubray. July 1725, Irvine
contra the representatives of Dougal. Hope, (*Husband*) 3d February
1616, Douglas *contra* Hamilton.

A WOMAN granted bond to her son, *durante matrimonio*, to furnish him weekly a certain proportion of vivers, the price of which he was to pay her so soon as his pleas at law should be determined; this bond was found null, tho' the granter had a separate aliment established to her. Stair, 22d July 1680, Baillie *contra* Lady Lethem.---- A bond of provision granted by a woman *vestita viro*, to her daughter's husband in name of tocher, found null. February 1720, Colquhoun of Tilliehewn *contra* executors of the Lady Roseburn.---- A married woman having become bound in a contract of marriage to provide the wife in a tocher, in view of which the husband had established his wife in a suitable liferent, yet the said obligation was found null, as being granted without the husband's consent. Colvil, 20th December 1579, Primrose *contra* Lady Rossyth.

A WOMAN, *vestita viro*, granted bond for 5000 merks to the heirs of her daughter's marriage, reserving her own liferent; the Lords sustained the obligation, it not being to take effect during the granter's life. February 1720, Colquhoun of Tilliehewn and Elisabeth Anderfon his Lady *contra* executors of the Lady Roseburn.

A BOND granted by a wife, *stante matrimonio*, with consent of her husband, was sustained, because the creditor had granted backbond, that he was only to make use of the same to lead an adjudication, whereby it only had the effect of a disposition. Stair, 23d January 1678, Bruce *contra* Paterfon.

ONE having granted an assignation, bearing to be for relief of a debt, wherein the assigney stood cautioner for him, and also for relief to his wife of another debt, wherein she was cautioner; against the wife pursuing the assigney for her relief, it was objected, That her cautionary-obligement was null, and therefore, *quoad* her, there was no debt to demand relief of. Answered, A wife's personal bond, as it is a valid natural obligation, so it is sufficient by our law to found an action; only the law gives the debtor a perpetual exception to protect her from payment; this exception is a privilege she may use or not at her pleasure, and if she is willing to wave her privilege, she must be entitled to relief, equally with any other cautioner. The Lords found, That the pursuer might forbear to make use of her privilege as a wife, and insist for her relief as a cautioner. Stair, 18th July 1672, Watson *contra* Bruce.

A BOND granted by a woman and her second husband to her first husband's children for their legitim, which she was bound to pay as executrix to her first husband, was found effectual, tho' granted *stante matrimonio*. Haddington, 13th January 1610, Primrose *contra* Watson. Haddington, 14th March 1623, Douglas *contra* Robertson.---- A woman *vestita viro*, having a *proprium patrimonium*, constituted by her father, for her own, and children's aliment, exclusive of the husband; her bond was found effectual against her, being for furniture to herself.

herself and children. Stair, Dirleton, 23d February 1672, Nielson *contra* Arthur. ---- An obligation granted by the wife, albeit without her husband's consent, being for her abulziaments and aliment, will be sustained, tho' it bear not so *per expressum*. Haddington, 12th December 1609, Zibbis *contra* Countess of Orkney. ---- The nullity of a bond, granted *stante matrimonio*, being objected; answered, Tho' it bears borrowed money, the true cause was for marriage-clothes; the Lords sustained the bond *quantum in rem versum*, without necessity of a distinct process for the price of the furnishing. Stair, Fountainhall, 8th November 1677, Sinclair *contra* Richardson. ----- A wife having got a separate aliment, was found not liable for what was furnished to her before the aliment was constituted, because that was *in rem versum* of the husband; and therefore neither was her promise to pay this furnishing binding upon her, being granted *stante matrimonio*. Marcus, (*Stante matrimonio*) 6th July 1688, Robin *contra* Countess of Southesk. ---- The like with regard to a bond granted by a wife, while the husband was abroad, for the expences bestowed in repairing a salt-pan, of which she was provided to the liferent after the husband's decease, these expences being *in rem versum* of the husband only. Fountainhall, 12th February 1703, Deans *contra* Allan.

A wife is at liberty to bind herself in all obligations with regard to her own property, provided it be with the husband's consent.

A BOND granted by a wife during her marriage with her husband's consent, containing an obligation to infeft with a procuratory, was found null as to the personal obligation, but sustained as to the obligation to infeft; tho' it was pled, That the principal being null, the accessory cannot subsist. Stair, Newbyth, Dirleton, 15th December 1665, Gilmour, January 1666, Eleis *contra* Keith. ---- The like Marcus, (*Stante matrimonio*) December 1683, Marshal *contra* Ferguson. Fountainhall, 2d and 3d February 1686, Somervell *contra* Paton. ---- And in such a case, an adjudication led upon a personal obligation was found null, tho' the adjudger urged, That allowing the obligation to be ineffectual *quoad* personal diligence, it behoved to be considered a subsisting obligation to support the infeftment granted in security thereof; why not then, an additional security upon the land by adjudication? Dalrymple, Bruce, 14th June 1715, Shearers *contra* Ker. -- The husband as heretor, and the wife as liferenter of a tenement, disposing an annualrent out thereof, and obliging them to pay as well not infeft as infeft, the wife was found personally liable to pay the annualrent of all years since her husband's decease. Haddington, 22d November 1611, Wauchop *contra* Waddel. Haddington, 9th June 1612, Ld. Kinnaird *contra* Sharp. ---- Bond of borrowed money by a husband and wife, containing an obligation upon the wife to pay annualrent out of her lands, but no formal obligation to infeft the creditor in her lands, found null *quoad* the wife: For tho' a woman may sell or burden her proper lands with her husband's consent, it must be done *debito modo*. Durie, 24th March 1626, Greenlaw *contra* Galloway.

She may also alienate her property with her husband's consent, whether gratuitously or onerously.

AN heretrix, with consent of her husband, disposed her lands, and became bound for warrandice and delivery of a progress; these obligations were not found null, tho' granted by a wife *stante matrimonio*; for if a wife can sell her heretage, it must follow, That she can involve herself in rational obligations relative thereto. Stair, 21st January 1674, Rid-

Ridpath *contra* Yair. As an heiress may wadset her lands with her husband's consent, tho' the wadset-sum go to the husband, so she may bind herself to pay back the money upon requisition, as a part of the contract of wadset. Hope, (*Husband*) 3d February 1617, Gordon *contra* Gordon. ---- And for the same reason may bind herself personally to pay a back tack-duty. Stair, Gosford, 14th November 1672, Lockhart *contra* Lady Bute. ---- A wife may effectually pawn her *paraphernalia* for her husband's debt. Dalrymple, 31st January 1717, Clark *contra* Lady Sharp. ---- A wife may exercise acts of ordinary administration with regard to her own property, without her husband's consent; but without his express concurrence, she cannot dilapidate or alienate, whether onerously or gratuitously; and therefore a married woman at her own hand impleading her *paraphernalia* for security of money borrowed by her, the same was found null, and *rei vindicatio* sustained to the wife's representative against the creditor, without being obliged to pay the debt. 11th July 1735, Gemmil *contra* Yuile. ---- The contrary formerly found by a scrimp plurality. Forbes, 13th, Fountainhall, 17th July 1711, Pringles *contra* Irvine. ---- A workman having repaired a salt-pan, while the proprietor was abroad, upon an obligation granted by the wife, to whom the liferent of the subject was provided as a part of her jointure, to put him in possession till he were satisfied out of the profits; in a suspension of a charge on the obligation, after the husband's death, the Lords found the same null, as granted without her husband's consent. Fountainhall, 12th February 1703, Deans *contra* Allan.

FOUND, (which was never decided before) That in the wife's deeds of administration of her own proper goods, not falling under communion, the husband's consent is not necessary. Fountainhall, 21st February 1679, Cockburn *contra* Burn. ---- It was found that a wife even in the state of separation from her husband, has no power to oblige herself, or to contract debt, but only to do these necessary deeds which tend to the administration of her separate patrimony, as setting tacks to her tenants, selling and disposing of her victual, buying meat, clothes, &c. Fountainhall, 22d July 1680, Baillie *contra* Lady Letham. ---- An alimentary provision, settled upon a woman, does not fall under the *jus mariti* after her marriage, nor is affectable by her husband's creditors; but it being controverted whether it fell under the husband or wife's administration, the Lords, in respect of the husband's prodigality, found, That which of them offered the best caution to apply it to its true use, which was the maintenance of the family, the husband included, ought to be preferred in the administration and power of uplifting, to prevent misapplication. Fountainhall, 27th January 1709, Dick and Dunbar *contra* Lady Pinkell.

A LADY *stante matrimonio* being infeft in some of her husband's lands, and having at granting thereof bound herself, That, when her son came to perfect age, she should restrict the said infeftment to an aliment, this infeftment being given to her not in *remunerationem dotis*, but a kind of gratuity, and in view of granting the said obligation, she was not allowed thereafter to alledge her being clothed with a husband at granting, altho' he did not subscribe with her. Maitland, 7th February 1570, Ld. Edmonston *contra* the Lady,

Husband's
consent, how it
must be inter-
posed.

AN heretable bond granted by a husband and wife upon her property lands, found null *quoad* the wife, because it did not bear the husband's express consent authorising her therein. Spotiswood, (*Husband*) Durie, 19th December 1626, Matthew *contra* Sibbald. ----- A wife having given a renunciation of a tenement in her husband's absence, in favours of her son, it was found null *ab initio*, notwithstanding the husband upon his return ratified the same, which was found not sufficient to validate a right *ipso jure* null; and therefore found, That a new renunciation, with the the husband's consent, was necessary. Maitland, Spotiswood, (*Husband*) 12th February 1566, Dunbar *contra* Melvil. ----- The contrary afterwards found. Fountainhall, 23d February 1698, Lady Cochran *contra* Dutches of Hamilton; where a wife assigning a bond, without her husband's concurrence, but as to which bond he had renounced his *jus mariti*, the husband's posterior ratification of the assignation was found sufficient to validate the same.

What if the
husband be
under a natu-
ral or legal
incapacity?

IN a reduction at a wife's instance, of a gratuitous disposition, granted by herself, wherein was reserved her own, and her husband's life-rents; the Lords found, That the husband being furious the time of granting the disposition, and continuing so till his death, the want of his consent to the disposition was not relevant to annul the same. 21st June 1729, Bridget Bold *contra* George Montgomerie. --- A wife after her husband's forfeiture, having granted her personal obligation, without his concurrence, for a debt due by him; the question occurred, Whether this obligation was *ipso jure* null, yea, or not? And it was argued for the creditor, That this nullity, being introduced by our municipal law, could only be in force so long as the civil and municipal rights betwixt husband and wife subsisted, which were now entirely dissolved by the forfeiture; the Lords found the defence of being *vestita viro*, not relevant, in regard the husband was attainted at the time of granting the obligation. 29th June 1733, Dall *contra* Countess of Southesk.

A married woman's deeds in what cases effectual against her husband.

Wife presu-
med to be *præ-*
posita negotiis
domesticis.

THE Lords refused to allow accompts of tradesmen, who had furnished necessities to a gentleman's wife, children, &c. during his absence out of the country, they wanting his special warrant, altho' they offered not only to prove that, but divers years furnishing to himself and family, immediately preceeding the absence; and this, because at his departure he had settled a yearly aliment on his lady for the uses foresaid, the not intimation whereof to the furnishers, was not regarded, they not being bound to furnish. Durie, Spotiswood, (*Husband*) 21st June 1634, Tradesmen *contra* Hamilton. --- The wife is understood to be *præposita negotiis domesticis*; so that for provision to the house, she may take from fleshers, bakers, &c. such furnishing as is necessary, and the furnishers are not obliged to enquire, whether the husband has given her money, sufficient to provide his house, seeing he has a remedy, if he has any suspicion of her conduct, by inhibiting her. Dirleton, 7th December 1675, Dalling *contra* M'Kenzic. ----- The Earl of Southesk, being pursued for payment of an accomp^t furnished to

to the countess at London; it was found, if the Countess went to London without his approbation, or a just reason, That the Earl was obliged for no more than would have been her expences had she stayed at home, and that, whether she were inhibited or not. Stair, Gosford, 6th July 1677, Allan *contra* Earl and Countess of Southesk. ----- A husband, after dissolution of the marriage, was found liable for accompts taken off by the wife during the marriage, tho' without his order, and tho' she was competently furnished *aliunde*. Marcus (*Stante matrimonio*) November 1682, Alstouns *contra* Philips, &c.

A WIFE is presumed to be *præposita negotiis domesticis viri*, but this presumption was not extended to a lady tencer, granting discharges of her terce-duties, which it was found she could not do without consent of her present husband. Colvil, June 1582, Lady Boyd *contra* Ld. Airth, &c. ----- Nor to a wife uplifting her husband's mails and duties. Colvil, June 1587, Ld. of Pittarrow *contra* his tenant. ----- Nor to a wife uplifting money due to her husband by bond, as to which a commission in writ was found necessary. Stair, 3d June 1680, Buchanan *contra* Nairne. ----- An apprentice being bound to an apothecary, not by his father, but by his mother, who also paid part of the apprentice-fee; in a pursuit against the father for the remainder, the apprentice, after two years service, having deserted, it was found the *præpositura* could not be extended to such deeds, neither was the husband's knowledge and silence found relevant to infer a consent or *præpositura* as to this matter, seeing a man is often forced to be passive with regard to the management of an imperious wife, while he is far from approving of her conduct; the husband was therefore assilzied. Fountainhall, 19th November 1698, Arnot *contra* Stevenson. ----- A wife who, in her husband's absence, delivered to his creditor certain goods belonging to her husband in satisfaction of the debt, having got up the instructions, with a discharge thereof; and the husband having, after his return, retained the writs, without ever seeking back the goods, or reclaiming against what she had done; it was found, That the property thereof was effectually conveyed to the receiver, so as they could not be affected with another creditor's diligence. Forbes, 26th December 1711, Brown *contra* Dickson. ----- A person having borrowed money from a wife, and given his obligation, was found *in tuto* to repay the sum to the wife, and retire his obligation, tho' he was acquainted by the husband that the money was his. Durie, 16th March 1622, M'Math *contra* Home.

THE husband will be holden to pay for the price of wine bought by his wife, and sold in an open tavern, tho' it be not condescended on to have been bought by him or at his command. Haddington, 23d November 1609, Muirhead *contra* Douglas. ----- Otherwise where the wife lives a scandalous life apart from her husband. Haddington, 18th January 1610, *contra*. ----- Found, That a woman keeping a shop, and trafficking as a merchant, with the knowledge of her husband, he is liable for debts contracted by her upon the account of her traffick, *actione infistoria*. Dirleton, Gosford, 17th December 1675, Wilson *contra* Deans.

Where the wife carries on traffick under her husband's eye.

Inhibition
takes off the
presumption
of *præpositura*.

A HUSBAND was found not obliged to pay even for small necessities to his family, where he instructed his giving to his wife a sufficient competency for defraying such charges, and that she was also inhibited before the furnishing. Nicolson, (*Inhibition*) 26th July 1620, Kincaid *contra* Sanderson.---- Inhibition being served against a wife, and she being provided in a livelyhood by her husband, the Lords found him not bound to pay any furnishing and abulziaments for her, altho' the merchant was ignorant of the inhibition. Gosford, 23d June 1675, widow Auchinleck *contra* Earl of Monteith.---- A brewer pursuing a party for ale which he had furnished to his deceased wife, and which she had tapped under his own view, tho' he had inhibited her, but the inhibition was not intimated to the brewer; the Lords found, That the registred inhibition needed no further intimation to any party; but found it relevant, *scripto vel juramento*, that he allowed his wife to take drink from any person that would furnish her, and that he knew the pursuer did furnish after the inhibition, and yet did not discharge him nor interrupt, which being proved, they found him liable in the price of the ale pursued for. The author says, That some thought the husband ought to be liable, if he was *lucratus, quatenus in rem ejus versum*. Fountainhall, Forbes, 5th July 1709, Ker *contra* Gibson.

After proclamation of banns the woman is considered to be in the same case as if actually married.

Barred from
granting any
gratuitous
right after pro-
clamation.

AFTER proclamation of banns the woman can do no gratuitous deed to prejudice her future spouse. Haddington, 7th June 1605, Swyne *contra* Swyne. Haddington, 5th July 1611, Fletcher *contra* Auchinleck, (*Bond*) Durie, 29th January 1633, Scot *contra* Brown.---- A gratuitous discharge of the bygone annualrents of a bond after proclamation of banns, was not sustained in prejudice of the husband. Home, March 1682, Grant and Gilchrist *contra* Pringle.

What procla-
mation suffi-
cient?

A GRATUITOUS bond made by a woman after she was contracted, and the banns proclaimed in her future spouse his parish-church, was sustained, because the bond was given six weeks before she gave up her name to be proclaimed in the parish where she had dwelt a year before. Haddington, Durie, 8th July 1623, M'Doual *contra* Aitken.---- In a process of reduction at the instance of the husband and wife, of a gratuitous disposition granted by the wife, the Lords sustained the reason of reduction, That the disposition was granted after the parties were twice proclaimed in the church of Leith, the parish church where the husband dwelt, tho' the wife had her domicile in the Canongate, the receivers of the disposition having, *de recenti*, been communers in the treaty of marriage betwixt the parties, and found it not relevant to elide the same, That the wife, at granting the disposition, told that the treaty was broke up, the marriage having followed quickly after. 3d July 1722, M'Clellan *contra* M'Clellan and Mitchel.

What if there
is no proclama-
tion?

A WIDOW lady having a jointure, entred into a treaty of marriage with a second husband, and, among other articles, it was settled, That the eldest son, who was burdened with a liferent, should grant a tack
to

to the intended husband of the liferented lands, to endure for a year after the mother's decease, in case of the man's surivance ; at the same time she privately disposed her liferent in favours of her second son ; and the marriage having taken effect, without any formal contract or proclamation of banns, the Lords were of opinion, That this latent disposition was a gross fraud upon the wife's part, seeing the marriage was entered into with the declared view of the jointure, in so much that a provision was made for the husband's enjoying the jointure for a year after her decease. It likewise occurred, That a gratuitous assignation, not intimated, could not prejudice the husband, whose *jus mariti*, being a publick right, requires no intimation. Stair, Dirleton, 18th December 1667, Gillespie *contra* Auchinleck.

A LADY after the first proclamation of banns, giving a gratuitous discharge of a part of her jointure to her son of a former marriage, the same was found null, not only as to the husband's *jus mariti*, but as to the lady's own interest, tho' it was alledged, That the husband knew that the right was granted, which must infer his consent, he going on notwithstanding in the marriage, it being answered, That, if the husband knew, he knew also of remed in law. Gilmour, December 1665, Stair, Dirleton, 5th January 1666, Lady Bute and her husband *contra* the sheriff of Bute.

A wife cannot prejudice herself more than her husband after proclamation.

The wife how far *valens agere* without concurrence of her husband.

THE Lords refused to sustain process at the instance of an heiress, without concurrence of her husband, altho' his fraud in declining to concur was manifest. Colvil, May 1581, Lady Colluthie *contra* Maxwell.---An action was not sustained at the instance of a wife, tho' the summons was raised in her name, and her husband's for his interest, she not being authorised by her husband's concurrence ; and it was found that he behoved to be *in processu* ; but, if he refused concurrence, the Lords declared they would authorise the wife to insist by herself. Stair, 8th, Gosford, 9th July 1673, Hackett *contra* Gordon.---The like. Durie, 9th, Haddington, 10th January 1623, Marshall *contra* Marshall.---A wife in a competition with her husband's creditors, having repeted a reduction of her contract of marriage, upon minority and lesion, the husband being still alive ; and it being objected, That she could not insist without his consent, the Lords allowed her procurator to concur in this process, and to authorise her therein. Fountainhall, 28th July 1708, Byres *contra* Reid.

Cannot pursue without being authorised by her husband, or a curator *ad lites*, if he decline.

A WIFE being ejected during her husband's absence out of the country, and when it was supposed he was dead, the Lords sustained the pursuit, tho' at the time of advising the probation, it was offered to be proved he was alive. Dirleton, Stair, 16th November 1667, Chalmers and Gairdner *contra* Colvils.

A HORNING, at the instance of a wife, for a debt due to herself, was found null, because raised, charged and denounced upon, without her husband's consent or concurrence, altho' the husband was yet content to allow the same, because it being null *ab initio*, 'twas thought

If she can prosecute legal diligence without concurrence of her husband?

that it could not be helped by his posterior consent, especially the wife being now dead. Spotiswood, (*Husband*) Durie, 27th July 1631, Napier *contra* Rollock. ---- This nullity being proponed against an arrestment, That it being raised at the instance of a woman, upon a bond due to herself, neither the letters nor execution made any mention of her now husband for his interest, tho' the summons of forthcoming ran in both their names; the Lords thought that a wife might be considered as a minor, *qui meliorem suam conditionem potest facere sine auctoritate tutoris vel curatoris*; and that the husband's subsequent consent did validate the act, and that her not being *integra personâ in judicio* without her husband, was introduced in his favour, and so ought not to be turned to his prejudice, and therefore repelled the nullity, and sustained the arrestment. Fountainhall, 29th January 1702, Hepburn *contra* children of dean of guild Blair.

If she may
appear for her
interest in a
process with-
out concurrence
of her husband.

Found, That a wife, being infest in lands by a former husband, may compear in judgment, and defend in a removing, altho' her present husband, who has his *jus mariti* of the lands, be at the horn. Sinclair, 23d January 1541, Ld. Craige *contra* Hepburn.

May have
action against
her husband.

A WIFE, without the concurrence of her husband, was allowed to insist against him in a reduction of her contract of marriage, upon minority and lesion. Durie, 8th July 1642, Inglis *contra* Aikit. ---- Once the Lords gave their opinion, That no action, nor no diligence can proceed betwixt man and wife while the marriage subsists. Durie, 11th January 1625, Hamilton *contra* her husband.

But must
have a curator
ad lites.

THE Lords authorised a married lady's advocate to concur with her in an action against her husband, as minors are authorised against their tutors and curators, without which remedy of law, no way could be found to redress such persons, tho' extremely wrong'd. Gosford, 4th June 1673, Lady Wamphray *contra* the Ld. ---- A married woman representing by bill, That by her contract she was provided to the liferent of a certain sum; That her husband was *vergens ad inopiam*; and therefore craving, That certain persons, whom she named, might be authorised to pursue in her name, as her curators *ad lites*, for securing her jointure against her husband and his creditors, her friends having omitted to insert some person in the contract at whose instance execution should pass; there being no answer, the Lords complied with the desire of this petition, as being conform to the common law, the practice of foreign nations, and our own decisions. Fountainhall, 17th February 1703, Scot supplicant. ---- In a similar case, the Lords remitted the petition to the ordinary on the bills, to examine into the husband's circumstances, and what his creditors were doing, that so they might proceed not upon her allegation, but *cum causæ cognitione*, and yet summarily that she might not be prevented by anterior diligences. Fountainhall, 18th November 1704, Katherine Ross supplicant.

May prosecute
legal diligence
against
her husband,
without being
authorised by
a curator.

INHIBITION granted to a wife, upon her husband's obligation to infest her in a jointure, altho' they lived together without any separation. Durie, 13th July 1638, Lady Glenbervie *contra* her husband. ---- The Lords, upon a bill, allowed a wife letters of horning and inhibition against her husband for her jointure, because he was turned hypochondriac

pochondriac, and was dilapidating all; and this without naming a curator to her. Fountainhall, 15th June 1678, suppliant.---
A wife may proceed in diligence against her husband for payment of a separate aliment, without being authorized by a curator. Fountainhall, 7th November 1695, Earl of Argyle *contra* his Lady.

A DECLARATOR of irritancy having past against a wife during the coverture; after her husband's death she raised reduction upon this ground, That during the marriage she was *non valens agere*, and now she was ready to purge. It was answered, That wives, as to their heritable rights, *quæ non transeunt in jus mariti*, have no privilege, but are conveyable and decernable as others. The Lords refused to sustain the reduction. Stair, 16th November 1675, Taylor *contra* Gibson.--- Objected against a relict, insisting in a reduction of her contract of marriage, upon minority and lesion, that she had not revoked and raised reduction *intra annos utiles*; the Lords repelled the objection, she having timously, after dissolution of the marriage, revoked and raised reduction. Forbes, 25th July 1710, Chalmers *contra* her husband's creditors. Dalrymple, Bruce, 14th December 1714, Greenhill *contra* Stewart.

If a woman can be cut out of her interest by lapse of time, during the coverture.

It is the husband's duty to pursue for the tocher, and the wife being *sub potestate viri*, cannot insist for the same; and therefore a wife being infest for her liferent, in virtue of a contract of marriage, but upon this express condition, That she should have no benefit of her infestment, until the tocher were paid; it was found, That neither the husband nor his singular successor could obtrude this provision, which failed through his own fault, unless it could be instructed, That the husband did diligence, or, That the debtor of the tocher was known to be insolvent, the husband having lived seven years after the marriage. Stair, 21st November 1671, Menzies *contra* Corbet.

Husband bound to do diligence for recovering his wife's tocher,

A HUSBAND being bound in a contract of marriage, to add so much money to the tocher, and to employ all, &c. the Lords found him bound to employ, altho' the tocher was never paid him, and found his heir debtor for the same, and for the annualrents thereof from his father's decease. Hope, (*Husband*) 24th June 1625, Burd *contra* Gordon.----- A husband in a contract of marriage being bound to employ the tocher (which was to be paid, not by his spouse, but by a third party) on land, &c. and his heirs being charged by the relict for that effect; their defence, That the tocher was never received, was repelled, only execution was superseded till the next term, that in the *interim* diligence might be used for recovering it. Durie, 18th January 1637, Wolf *contra* Scot.--- A wife pursuing her father-in-law, to employ her tocher, and so much more of his own, for her liferent-use, conform to the contract, answered, He was not bound by the contract to employ till the tocher was paid up. The action was sustained for the defender's part, tho' the tocher was not paid, because the wife was not bound for the tocher, but her father, and which the defender ought to have done diligence for *debito tempore*. Stair, 22d February 1665, Campbell *contra* Campbell.----- A woman pursuing for her liferent, alledged, The tocher cannot be employed, because it was never paid; the Lords repelled this, since the husband had not done diligence

to recover it, and the wife could not, being *sub potestate viri*. Fountainhall, 25th July 1678, Stewart *contra* Stewart.

Unless where
due by the
wife herself.

WHERE the wife herself was the only person bound to pay the tocher, she was found to have no action for her jointure, until she performed her part, for such is the law of mutual contracts. Forbes, 3d February 1710, Lady Airth *contra* Hamilton of Grange.

The wife's personal privileges.

In what cases
liable to personal
diligence.

FOUND a horning excuted against a wife upon a decret recovered against her *principaliter*, and against her husband for his interest, null; because *stante matrimonio* execution could not follow against her, but against her husband only. Hope, (*Husband*) 27th July 1613, L. Roxburgh *contra* Countess of Orkney.----- The wife's debts, tho' just and lawful, can have no execution against her person while she is *vestita viro*. Fountainhall, 11th January 1704, Gordon *contra* Campbell.

A HORNING excuted against a married woman, for not finding caution in a lawburrows, was sustained, altho' the husband was not charged; and that it was alledged for her, That she could not find caution *stante matrimonio*, as not being able to give sufficient bond of relief without her husband, and this, because the horning proceeded upon her disobedience; and therefore her liferent was also decerned to fall by that horning, at the instance of her grandson the superior. Hope, (*Husband*) Haddington, 27th July 1613, Lord Roxburgh *contra* Countess of Orkney.----- A husband and his wife being both denounced upon a decret of ejection, recovered against them for unwarrantably ejecting the pursuer out of the said wife's conjunct-fee-lands; a gift of both their escheats being taken, before obtaining whereof the husband was dead, in a declarator against the relict the Lords found the horning null, being excuted against her whilst she was clothed with an husband, in whose lifetime no horning could be excuted against her, being under the power of her husband, who ought to have defended her, and she had no person to suspend, relax, &c. but as her husband should please to do for her; and this altho' decret was given against her *ob proprium delictum*; which nullity was received summarily, without necessity to reduce; but here the obtainer of the decret appeared not, but only the donatar. Durie, Spotiswood, (*Horning*) 16th February 1633, Stewart *contra* Bannerman.----- A party being incarcerated upon a decret of exhibition of writs; the Lords upon his application set him at liberty, because he had been decerned only *pro interesse*, his wife having the writs, with whom he had used endeavours to give them up, but ordained execution to pass against her, as in the case of a wife committing a delict. Fountainhall, 16th November 1678, Sibbald *contra* Alves.----- The Lords ordained caption to proceed against a wife, seeing the horning was not upon a debt, but upon her delinquence and disorder, threatening to burn a man's house. Stair, 8th January 1679, in Glasgow supplicant.----- A decret being recovered against a married woman, before the commissaries, for a verbal injury, condemning her in a certain sum, partly to the private pursuer, and partly to the procurator fiscal; the Lords in a suspension found, That no execution could go against her personally during the marriage. 5th December 1738, Gordon *contra* Pain.

No action of spuilzie was found competent to a husband against his wife, but *rerum amotarum* only; yet found, That if he should assign the goods intromitted with by her, the assignee might have action of wrongous intromission *ipsorum corporum*, altho' it was objected, That *nemo potest plus juris in alium transferre quam ipse habet*. Colvil, Brown *contra* Montier.

Actio rerum amotarum.

Deeds betwixt husband and wife during marriage.

A RELICT possessing a tack, which was set by the master to her husband, and her after his decease, the Lords in a removing against her, at the instance of the master, found her title good, notwithstanding it was alledged to be *donatio a viro facta uxori*, which was *de facto* revoked by his accepting a posterior tack, wherein no mention was made of the wife, and found, the tack not revocable, nor the wife prejudged by the posterior tack; nor was it respected that the husband was the presumed acquirer of the tack, because it was a deed immediately flowing from the setter to her husband and her, and by inserting her name as liferenter, after her husband's decease, the husband was not thereby made *pauperior*, and law permits such donations *ad vitam & sustentationem uxoris*; and therefore not revocable. Durie, *penult.* January 1639, Ld. Craigmiller *contra* Chalmers. See Durie, 5th March 1629, Lady Borthwick *contra* Goldilands. ----- *Ornamenta morgnetica* gifted during the marriage, are not revocable by husbands. They have the privilege of *paraphernalia*, and are not affectable by the husband's debts. Marcus, (*Contracts of marriage*) March 1684, Craig *contra* Monteith. See the section about *paraphernalia*. ----- A wife's consent to a contract of wadset of her liferent lands, with a back tack to the husband, his heirs and assignies; was found valid as to the creditor, but revocable as to the husband, so as she might have the mails and duties what was over the wadsetter's annualrent. Stair, Gosford, 28th June 1673, Arnold *contra* Scot. ----- An heiress in her contract of marriage having resigned her lands in favours of her husband and herself in conjunct-fee, and to the children of the marriage in fee; which failing, the one half to her heirs, the other half to his heirs; and during the marriage, they both having resigned in favours of themselves in conjunct-fee, and to the son of the marriage; which failing, to the husband's heirs and assignies; this deed which established the absolute property in the husband, now that the heirs of the marriage had failed, was found a donation *inter virum & uxorem*, and revocable by the wife. Marcus, (*Stante matrimonio*) February 1686, Stewart *contra* Foulis.

Pure donation in what cases irrevocable.

A MAN having bound himself to his wife, to pay her first husband's debts, tho' this was done to oblige his wife, and a kind of donation to her; yet as this obligation was in favours of third parties, and a *jus* thereby *quæsitum tertio*, there was found no place for revocation here, more than if the obligation had been granted directly to the third party, without intervention of the wife. Colvil, Spotiswood, (*Husband*) December 1591, Ld. Heisled *contra* Lindsay. ----- A donation by a wife, directly in favours of her husband's children &c *contra*, is not revocable, because tho' donations betwixt a husband and wife are revocable,

In deeds betwixt husband and wife, where there are clauses in favours of third parties, these not revocable however gratuitous.

no law makes a donation revocable granted by a married person to a third party. Stair, 19th February 1663, Muir *contra* Stirling. Stair, 15th January 1669, Hamilton *contra* Bayne. ---- A bond taken by a man to himself and spouse in liferent, and her heirs in fee, found revocable *quoad* the wife's heirs, as well as herself; for a donation given in this shape, is not understood to be given in favours of a third party, but of the wife herself. Durie, 22d March 1634, Glasfurd *contra* Dawling. ---- A donation by a wife to her husband's eldest son, tho' *eadem persona cum patre*, was not found revocable as a *donatio intra virum & uxorem*, Fountainhall, 2d and 3d February 1686, Somervell *contra* Paton. ---- A man having disposed his moveables to a third party, reserving his liferent, with a power and faculty to his wife to alter, &c. this disposition, tho' nominally in favours of the third party, yet truly in favours of the wife, found revocable by him, even after the wife's death, being no better than a cover & *fraus facta legi*; and here the wife's faculty to alter was a virtual fee, and the case the same as if the disposition had been directly in favours of the wife, with a substitution to the third party, in which the fee established in the wife, being ever subject to revocation, there could be no pretence of a *jus quæsitum tertio* by her death. 1st February 1728, Sanders *contra* Dunlop.

Postnuptial
contract not
reducible,

A POSTNUPTIAL contract of marriage is not reducible, as *donatio inter virum & uxorem*. Stair, 22d November 1664, M'Gill *contra* Ruthven. The like, tho' the contract was so far unequal, that it was found reducible by the wife, upon minority and lesion. Forbes, 25th July 1710, Chalmers *contra* her husband's creditors. ---- A mutual general disposition betwixt a wife and her husband during the marriage, no contract having preceded, is no *donatio inter virum & uxorem*, even *quoad excessum*. Bruce's MS. 31st July 1716, Stirling *contra* Crawford.

Nor other
mutual con-
tract.

A FATHER having obliged himself in his daughter's contract of marriage, to make her equal with the rest of the children at his decease, and having, in prejudice of that obligation, disposed his whole moveables to his son, a reduction was raised of the disposition by the daughter's husband, and, without discussing the process, a settlement was made, by which the son gave up his disposition, and the husband infest his wife in an additional jointure: This not being a donation, but part of a bargain, was found not revocable, tho' the husband contended, That he got nothing by obtaining the disposition to be thrown up, but what he was entitled to by law. Durie, 29th June 1630, Cochran *contra* Dawling. ---- A contract, tho' made betwixt husband and wife *stante matrimonio*, whereby he reponed her to all he got by her, and she renounced all she could claim by his death, was sustained. Durie, 14th March 1634, Gib *contra* Miller. ---- The like. Haddington, 21st February 1606, Stewart *contra* his wife. ---- Tho' a mutual contract executed betwixt a husband and wife is not revocable, yet, if it be very unequal, and the excess considerable, it will be presumed to have been intended as a cover for a donation, and therefore revocable. Stair, 20th November 1662, Children of Woolmet *contra* Douglas. ---- A bargain made betwixt husband and wife during the marriage, whereby their contract of marriage was past from, and the

the longest liver to bruike all, was found onerous and not revocable, as *donatio inter virum & uxorem*, 13th July 1733, Shearer *contra* Sommervell.

A LIFERENT provision to a wife, not otherwise provided, granted *stante matrimonio*, not revocable, provided it be suitable to the circumstances of the parties. Gilmour, January 1662, relict of Dalglish *contra* debtors. Fountainhall, 1st December 1687, Carmichael *contra* Corser. — But revocable *quoad excessum*. Stair, 27th June 1677, Short *contra* Murrays. Bruce, 18th February 1715, Lord Lindores *contra* Stewart.

Liferent provision to a wife *stante matrimonio*, if revocable?

A WOMAN being married, without a contract, and, during the marriage, having conveyed to her husband the liferent provision she had by a former husband, this was found a donation revocable, seeing the husband got of her means *aliunde, jure mariti*, what was reckoned a suitable tocher. Stair, 22d January 1673, Watson *contra* Bruce. — A disposition by a wife to her husband of an heretable bond during the marriage, found revocable by her, as a donation, tho' there was no contract, nor had she brought any other tocher with her; for tho' a liferent provision granted to a wife not otherwise provided, is a most rational deed, and not revocable, it will not hold *e contrario*, because the husband is naturally bound to provide for his wife, and not the wife for her husband; and *esso*, it should hold *e contrario*, yet it could not be subsumed in this case, that the husband was not otherwise provided for. Stair, 15th December 1676, Inglis *contra* Lawrie.

Provision granted to the husband *stante matrimonio*, in place of tocher, if revocable?

A LIFERENT infestment granted to a wife *stante matrimonio*, found not revocable, as being a remuneratory donation, the wife having brought a considerable tocher with her, and there was no contract of marriage. Durie, 25th March, Spotswood, (Husband) 23d July 1635, Ld. Lawriston *contra* Lady Dunnipace. — A husband getting addition of means, falling to him by his wife, may grant a remuneratory right, which he cannot revoke. Gilmour, 13th February 1664, Countess of Oxenford *contra* the Viscount. — The like. 11th July 1735, Creditors of Brownlie *contra* his relict. — A second provision by a husband to his wife, was reduced, the wife not being able to condescend upon any remuneratory provision; for tho' whatever falls to the wife as moveable, would have belonged to the husband *jure mariti*, yet, if it had been of any value, the Lords would have sustained the provision as remuneratory, in gratitude to the wife. Stair, 23d November 1664, Halyburton *contra* Porteous. — A tack granted by a husband to his wife during the marriage, bearing *for love and favour*, was yet sustained as a remuneratory donation, the wife condescending, That it came in place of some prestations in the contract of marriage, which her husband proved unable to implement, and so, as not revocable, was found good against a posterior onerous creditor apprising the lands set in tack. Stair, 26th January 1669, Chisholm *contra* Lady Brae. — A lady for taking off the objection, that her additional jointure was a *donatio inter virum & uxorem*, having alleged that it was remuneratory, and for proving this, having evinced that her husband was debtor to her sister in a sum, and that he got up his bond after her death; the Lords found this not sufficient to prove

Remuneratory donation.

the additional jointure remuneratory, unless the lady liferentrix would prove, that the right of the husband's bond was established in her own person, and assigned and made over by her to her husband. Fountainhall, 16th February 1688, Lady Balmakellie *contra* Falconer.

Donation after proclamation of banns.

A DONATION made after the contract, but before marriage, was found not revocable, not being *donatio inter virum & uxorem*. Stair, 23d January 1680, Home *contra* Homes. Harcus, (*Stante matrimonio*) February 1688, Gordon *contra* Gordons.

Revocation how barred.

A WIFE having judicially ratified a disposition to her husband, and sworn *never to come in the contrary*, was not found to cut her off from revocation, Stair, 15th February 1678, Gordon *contra* Maxwell.--- A wife, in her contract of marriage, being provided to a liferent, and a prohibitory clause adjected, That it should not be in her power to renounce the same, without the consent of a third party named, and she notwithstanding having renounced a part of her jointure in favours of her husband and his heirs, which she ratified upon oath, but revoking the same after her husband's decease, both as *donatio inter virum & uxorem*, and as a deed unlawful to be taken by the husband after the above clause in their contract of marriage, the Lords notwithstanding would not repon the woman, but sustained the renunciation *ob religionem juramenti*. Fountainhall, 4th December 1685, Richardson *contra* Michy.--- Marriage being dissolved upon account of adultery, this found to bar the adulterous person from revoking. Colvil, 16th June 1575, Murray *contra* Livingston.

Power of revocation when it ceases.

DONATIO inter virum & uxorem is validly confirmed by the decease of either of the married parties. Colvil, February 1582, Lady Effilmonth *contra* tenants. Colvil, January 1587, Maxwell *contra* .--- A donation by a husband to his wife found validly revoked, tho' after the wife's decease. Durie, 22d March 1634, Glasford *contra* Dawling.

Form of revocation.

FOUND, That an infestment given by the husband to the wife *stante matrimonio*, may, without reduction, be annulled by a private revocation. Colvil, Earl of Eglington *contra* his Lady.--- In a reduction, at the instance of a man's heir against the relict, of an infestment granted by the husband in her favours, *stante matrimonio*, the Lords sustained a revocation made *in articulo mortis*, in presence of three witnesses, because he could not then subscribe, and thereafter the same was ratified, approved and declared to be his will in the same paper, in presence of two notars, *en Chattelet de Paris*, which the Lords sustained as a formal and solemn revocation. Hope, (*Husband*) 17th March 1615, Earl of Angus *contra* the Countess.

Contract of separation bona gratia.

A CONTRACT of separation, *bona gratia*, found null and ineffectual, in consequence whereof money saved by the wife during the actual separation, found to belong to the husband. Durie, 11th February 1634, Drummond *contra* Captain Rollock.--- But thereafter such a contract was found effectual, revocable only, and therefore a separate aliment found to cease after revocation, but to be good to the wife *quoad bygonas*. Stair, Newbyth, 6th February 1666, Livingston

ston *contra* Beg. Fountainhall, 7th November 1695, Earl of Argyle *contra* his lady. --- The like. Bruce, 9th February 1715, Gordon *contra* Gordon. --- The like. Forbes, 12th February 1713, Forbes *contra* Abernethie.

A MARRIED couple having entred into a contract of separation, one article of which was, That each party should be in their own place, as if the marriage had never been; and the wife, upon the faith of this contract, having renounced her jointure she had by a former husband; but the parties thereafter agreeing to pass from the contract, and again to cohabit together, there was a process raised for payment of the wife's jointure. The defence was, That the contract restoring each to their own place was mutual and onerous, and not revocable, and therefore the discharge granted in consequence of it must be good to the defender, a third party, as flowing from a person standing at the time in the full right. The Lords found, That the contract was revocable, and that the discharge granted in consequence thereof must fall with it. Forbes, 12th February 1713, Forbes *contra* Abernethie.

When such a contract is revoked, all things are restored in *statu quo*.

PROCESS sustained at a wife's instance against her husband, upon a promise to pay her a yearly sum of money for her sustentation, in regard he had maltreated her, and diverted from her, and cohabited with another woman. --- Durie, 21st December 1626, Lady Foulis *contra* her husband. --- Tho' a separation *bona gratia* is ever revocable, a contract of separation, founded upon articles of maltreatment sufficient for a legal separation, is not revocable; and therefore the separate aliment was sustained, tho' above a reasonable aliment, such as a judge would have determined. 29th November 1734, Home *contra* Lady Eccles.

Contract of separation upon a sufficient cause.

Marriage dissolving within the year, all things are restored *hinc inde*.

MARRIAGE being dissolved within year and day, all things are restored *hinc inde*, and that equally, whether the husband or wife was married before, yea or not. Durie, 23d July 1634, Maxwell *contra* Hairstones.

Holds whether in first or second marriage.

THE husband dying within year and day, his relict is not intitled to a terce. Haddington, January 1600, Lady Maxwell *contra* Lord Garlies.

Rights betwixt husband and wife.

A TACK being set to a man and his future spouse, in contemplation of the marriage, and the man dying before consummation, the Lords found, That the woman could pretend no right thereto, altho' she was in possession, by virtue of the set, before the man died. Balfour, (Tacks) *penult*. January 1562, Robertson *contra* Jackson. --- Found, That the marriage dissolving, by the husband's decease, within the year, all things must return *hinc inde*, not only with respect to the defunct's

Rights flowing from third parties in contemplation of the marriage.

heirs, but also with respect to a third party, who had bound himself to infest the wife, and accordingly did infest her. Nicolson, (*Double poinding*) Haddington, 8th June 1610, Ross and her husband *contra* Campbell. ---- In a contract of marriage the wife's mother, the father being dead, being the contractor upon her part, and paying a certain sum in name of tocher, was found intitled to repete the sum, upon dissolution of the marriage within year and day, in regard the tocher was given directly by herself; but it being alledged, That the money belonged to her defunct daughter, as being her portion natural, the Lords ordained the pursuer to find caution to hold the defender *indemnis* at the hands of the heirs and executors of the defunct. Durie, Spotiswood, (*Husband and wife*) 13th July 1627, King *contra* Ker. ----- In a contract of marriage the bride's brother covenanted to pay a certain sum in name of tocher with his sister, in satisfaction of her portion natural, &c. the marriage dissolving within year and day by the husband's decease, the relict insisted against her brother for the tocher stipulated, and urged, That the same belonged to her, as coming in place of her portion natural, of which the defender was discharged. Answered, The tocher was not payable to her, but to her husband, whose claim was now sopite by dying within year and day; and as for the discharge, every party being restored to their own place, her claim of legitim must revive, for which she might *age* as accords. The Lords sustained the defence, and found the contract dissolved even as to the brother and sister. Stair, 9th November 1672, Guthrie *contra* Guthrie. ---- The marriage dissolving within year and day, all things return as before the marriage, which was found in the case of an estate disposed by a father to his eldest son in contemplation of his marriage. Stair, 16th July 1678, Ld. Burleigh *contra* Ld. of Fairnie. ---- One having granted to his sister a bond of provision, bearing love and favour, and in satisfaction of her bairn's part of gear, payable the first term after her marriage, and she leaving the same by testament to her husband, and dying within the year, the Lords found the brother had no repetition, seeing the sum belonged to the wife, which she might dispose of at her pleasure, with her husband's consent. Haddington, 6th February 1606, Ld. Covington *contra* Veitch.

Marriage presents.

MARRIAGE dissolving within year and day, some pieces of plate and other things gifted by relations immediately after the marriage, delivered to the wife, without expressing on whose account, were found to divide equally betwixt husband and wife, seeing they were not to be esteem'd *jocalia*, things proper for the wife, Stair, 14th January 1679, Wauch *contra* Jamieson. ---- A widow found not liable to restore to her husband's representatives a silver medal that had been gifted to her by her husband *intuitu matrimonii*, the marriage having been completed, altho' it dissolved within year and day. Forbes, 14th November 1710, Dewar *contra* Wright.

Expences laid out during marriage.

IN an action for repetition of a tocher, the marriage dissolving within the year by the wife's predecease, the Lords allowed the husband to deduce debts due by the defunct before the marriage, paid by him, but refused any deduction upon account of aliment and other expences

expences bestowed during the subsistence of the marriage. Fountain-hall, Stair, 23d February 1681, Gordon *contra* Inglis.

MARRIAGE not having subsisted year and day, yet a living child being procreated, tho' it died also within the year, the Lords found, That the tocher was due, and appointed this to continue as a constant practick in all such cases. Durie, Auchinleck, (*Marriage*) Spotiswood, (*Husband*) 20th July 1632, Irvine *contra* Robertson.--- The like. Hope, (*Husband*) 26th January 1612, Ogilvie *contra* Riddoch.

A TACK being set to a man and his wife, and longest liver of them two, the marriage having been afterwards dissolved through the wife's fault, yet it was found, That the tack ought still to subsist, because altho' in that case all things given to the wife, *intuitu matrimonii*, must return to the husband and his heirs; yet such a tack set *stante matrimonio*, was found not to be granted *intuitu matrimonii*. Colvil, 19th December 1573, Countess of Argyle *contra* tenants.--- In a process for impotency, the pursuer seeking her *donatio propter nuptias*, her summons, as to that point, was not sustained, the separation not being *propter violationem thori, sed propter impedimentum naturæ*. Haddington, 14th July 1610, Earl of Eglington *contra* the Countess.

PRESCRIPTION, if it runs against a wife? See Prescription.

THE husband, if liable for the wife's delicts? See Reparation.

REVERENTIA maritalis, if sufficient to reduce deeds done by the wife, and to absolve her from penalties? See Vis & metus. See Bona & mala fides.

WIFE cannot be pursued without calling the husband. See Citation.

WIFE if a privileg'd creditor for the provisions in her contract. See Privileged debt.

ALIMENTARY provision to a wife falls not under jus mariti. See Personal and Transmissible.

RELICT's legal share how far excluded by voluntary provisions? See Presumption.

LEGAL share, sometimes a third, sometimes a half. See Legitim.

RELICT for her third has access only against the defunct's executors. See Executor.

WIFE's terce. See Terce.

HUSBAND's courtesy. See Courtesy.
5 M 2

TOCHER

TOCHER how far affectable by the husband's creditors. See *Fiar absolute limited*. See *Mutual contract*.

IN what cases the tocher presum'd paid. See *Presumption*.

DONATION betwixt husband and wife, when understood to be revoked. See *Presumption*.

HYPOTHECK.

Corns are hypothecated for the rent only of that year whereof they are the growth.

THE master of the ground has no privilege for his farms or preference to other creditors, prior to him in diligence, but for the present cropt. Haddington, 19th November 1611, Wardlaw *contra* Mitcher. ----- The same found tho' the rent was payable in money; and the Lords refused to sustain a general hypothec, upon corns as upon cattle, for any other year than the rent of that year of which they are the cropt. 21st January 1737, Crawford *contra* Stewart.

And for that year's rent they remain for ever hypothecated.

THE cropt and corns, growing in any year, do remain ever affected and subject to the master for that year's farm, wherein he is preferable to all creditors, altho' he do no diligence, and many years intervene. Durie, Hope, (*Mails and duties*) 25th July 1623, Hay *contra* Keith. Durie, 3d February 1624, *inter eosdem*.

Hypothec upon the stocking subsists but three months after the year's rent falls due.

THE master's hypothec upon his tenant's stocking subsists three months after the year's rent falls due, that he may have time to make it effectual for payment of his rent. Home, January 1726, Hepburn *contra* Richardson.

Landlord's power of detention in virtue of his hypothec.

THE Lords found, That the offering of caution by the tenant for the year's rent, does not take away the master's hypothec of the fruits, so as to warrant or authorise the tenant to carry the corns, at his own hand, off the ground; because, tho' it may be rigid in a master to refuse caution, yet *tutius est rei incumbere quam personæ*. Fountainhall, 11th November 1701, Lord Salton *contra* Club. ----- One having *currente termino* proceeded to poind a tenant's cattle, who was his debtor, notwithstanding the master interposed, insisting to detain the goods upon the ground in virtue of his hypothec; in a process of spuilzie, at the master's instance, the Lords found the poinding could proceed, the creditor having left sufficiency of goods upon the ground to answer the hypothec; and found, That the goods poinded were not liable to the hypothec so far as extended to the debt in the horning, tho' the goods retained were afterwards disposed of by the bankrupt tenant. 2d July 1731, Sharp of Hoddam *contra* Dr. Maxwell. ---- A poinding of a tenant's stocking being attempted in October, while the corn-cropt was wholly in the barn-yard, much more than sufficient for a year's rent; the landlord interposed, and refused to allow the poinding

to

to proceed, unless the creditor would find sufficient caution for payment of a year's rent, which was a greater sum than the debt in the horning. In a process against the landlord, for stopping the pouding, the Lords found the defender, in virtue of his hypothec, for the current year's rent, did warrantably stop the pursuer's pouding. 30th June 1736, Pringle *contra* Scot of Harden.----An offer of sufficient security or consignation of bank-notes to the value of the rent, was found a sufficient answer to a master interposing upon his hypothec, to stop a pouding *currente termino*. 21st January 1737, Crawford *contra* Stewart.

WHEN a tenant abstracts his goods off the ground, the master *de re-centi* can bring them back *via facti* by virtue of his hypothec. Stair, 11th December 1672, Crichton *contra* Earl Queensberry. ---But where goods were carried off the ground and sold, and the landlord having brought them back by the sheriff's warrant, but without process or citation, the same was found unlawful, being done *ex intervallo*; yet the purchaser was found liable as intruder for the year's rent, if there were not sufficient goods beside; upon payment of which, the goods were ordained to be restored *sine pœna spoli*, because of the colourable title. Stair, Dirleton, 9th February 1676, Park *contra* Cockburn.

Stocking taken off the ground, may be brought back *via facti*, provided it be done *de re-centi*.

A PROPRIETAR by setting a tack of his land, is not thereby denuded of the right he has to the fruits that grow upon his land, but the same remain his property to the extent of the tack-duty, and he may take himself to the ground, and to the possessors thereof; or to any intruder with the fruits of the same, for payment of the tack-duty; upon this footing, the master has direct access against a subtenant as intruder, for payment of his rent; and in a competition about the subtenant's corns, betwixt the master and one who had purchased the same from the subtenant, and paid the price, the master was preferred. Durie, 5th March 1630, Fowler *contra* Cant. --- A subtenant being pursued by the master upon his hypothec, not only for the farm of the room he possesseth, but for the whole tack-duty owing by the principal tenant, the Lords found, That the whole fruits growing upon the sublet ground, were impignorated to the master for the rent, as well as the fruits and goods upon the rest of his ground, unless he had accepted him as subtenant. Fountainhall, 25th June 1700, Lord Salton *contra* Club.----- Found, That a subtenant's stocking, is the same way liable to the master for a year's duty as the tenant's stocking is. Newbyth, 2d February 1667, Countess of Traquair *contra* Cranston. ---Action sustained at the landlord's instance; against those who had purchased his tenant's corns, to the extent of the intrusion; the year's rent being still resting. Fountainhall, 11th June 1678, Scot *contra* . ---The like against intruders with the corns and stocking. Gosford, 10th, Dirleton, 11th January 1677, commissar of St. Andrews *contra* Watson. --- Intruders with a tenant's corns are liable to the master *in valorem* for the rent of that crop, tho' they acquired the same for an onerous cause and *bona fide*, not knowing them to be the corns of that room. Durie, Haddington, ult. March 1624, Lady Dun *contra* Ld. Dun. ---The like, tho' the corns were bought in publick mercat, betwixt Yule and Candlemass. Durie, 29th March 1639, Hay *contra* Eliot. --- A donatar of single escheat recovering

Landlords process against intruders with subjects hypothecated.

vering by a special declarator the price of a tenant's corn from the intrometter, found liable to the master for the rent of that crop; and it was found, That the master had his option to insist against his tenant or the intrometter, or the donatar who received the price, and that none of them were intitled to the benefit of discussion. Durie, 3d February 1624. Hays *contra* Keith. ----- Process sustained at the landlord's instance against a poinder of his tenant's corns; nor was the defence found relevant, That the same were *bona fide percepti & consumpti*. Gofford, 18th December 1673, Ruthven *contra* Arbuthnot. ----- But in a tack of burrow-acres, where it was alledged to be the custom, to sell the corns directly off the ground to the inhabitants of the burgh, the buyers were not found subjected to the hypothec; and here the tenant had been a year out of the ground, and bankrupt before intending of the action. November 1723, Cunnison *contra* Somervell.

What if the
intrometter
has left suffici-
ency to answer
the year's rent?

AN intrometter with the tenant's corns, is liable *in valorem* for the rents of that crop; and in a pursuit for the same, it was not sustained as a defence, That at the time of the intromission, the tenant had as many horse, molt, &c. as would have paid the pursuer's farm; because the corns growing upon the ground are first and principally hypothecated to the master for his farm, in which he is preferable to all others. Durie, Haddington, ult. March 1624, Lady Dun *contra* Laird Dun. ----- The Lords sustained action at the instance of a master pursuing the buyer of his tenant's corns upon his hypothec, tho', at the time of the buying, the tenant had as much other corns left behind as would satisfy the master and sow the ground; and found he ought to have alledged, That there were as much other corns left at, or after Candlemass, before which time the master could not meddle with the tenant's corns for his farms. Nicolson, (*Arrestment*) 19th July 1627, Swinton *contra* Seaton. Durie, 29th March 1639, Hay *contra* Eliot. ----- Tho' corns be the principal subject of the hypothec, the other goods are also subjected to the hypothec *secundo loco*; and therefore a poinder of cattle was found liable as intrometter, not having left at the time of pointing corns and other goods sufficient to satisfy the hypothec. Durie, 29th June 1642, Ld. Polwarth *contra*

No hypo-
thec upon
cloth or manu-
factures.

FOUND, That masters have no hypothecation of cloth or manufacture, either for rents or feu-duties, unless by accident, as *invecta in urbanis* for house-rents. Marcus, (*Hypothecation*) January 1685, Kiery *contra* Ross.

Tack of
fishing.

FOUND, That an heretor has a tacite hypothec in the salmon caught by his tenants in his water, as being *fructus aquæ*, tho' the fish were sold in a publick mercat. Home, February 1687, Molison *contra* Smith and Nicol. ----- The same found against a donatar of escheat, whose yearly intromission, as in the case of corns, made him liable yearly for the rent, provided he intromitted each year with as much as would satisfy the rent. Stair, 4th July 1667, Cuming *contra* Lumfden.

Tack of
a burgh's cu-
stoms.

THE town of Edinburgh having set in tack a branch of their customs to Provan, who sublet the same to Garner, and arrestment being laid in Garner's hands for a debt due by Provan, the town of Edinburgh

burgh appeared in the forthcoming, and was preferred, Garner being no otherwise debtor to Provan, but for his sub tack duty. Gilmour, Newbyth, 31st January 1665, Anderfon *contra* Provan and town of Edinburgh.

THE British statute 8vo *Annæ*, entituled, *An act for better securing of rents, and to prevent frauds committed by tenants*, was found not to reach Scotland. November 1723, Cunnison *contra* Somervell.

British statute anent the hypothec, extends not to Scotland.

A LANDLORD of an house may stop a poinding until he be satisfied of a year's rent, and no more; yet a poinding being stop'd upon alledgeance of three terms rent owing to the landlord, he was not found liable in a deforcement, in respect the poinder offered not security to him for a year's rent, but only to pay a term's rent, which was not sufficient. Durie, Auchinleck, (*Poinding*) 7th December 1630, Dick *contra* Lands. ----- *Omnia invecta & illata* stand hypothecated to the landlord for his rent in urban tenements; nor can the tenant remove his furniture, unless he find caution for a year's rent. Fountainhall, 12th June 1702, Countess of Callendar *contra* Lady Cefnock,

Hypothec of *invecta & illata*, in an urban tenement.

A WRITER has an hypothec upon his constituent's papers, for security of his claim for pains and debursments; nor does the hypothec fall upon getting a written obligation for his payment. Fountainhall, 27th November 1705, Ayton *contra* Colvil. ----- In a declarator of recognition, the writs of the lands being called for by a diligence, to shew that they held ward of the pursuer, the defender's writer, in whose hands they were, was found obliged to exhibit them, notwithstanding of his hypothec, which could not bar the third party's interest to have them produced *per modum probationis*. 31st January 1738, Earl of Sutherland *contra* Couper.

Hypothec competent to writers and agents.

FURNISHERS of materials for building have not a hypothec upon the ship. Home, 18th January 1726, Maxwell *contra* Wardroper. ----- One having sold a ship, with a resolute condition, That in case the price was not paid within a limited time, the sale should be void; and the purchaser having, in the *interim*, employed workmen to repair the ship, and becoming bankrupt, without paying the price or the workmens wages; in a process against the seller for the reparations, answered, He was satisfied to pay *quatenus in rem ejus versum*, further he was not bound, seeing the pursuer had followed the faith of the purchaser, by whose order expences were bestowed upon the ship neither necessary nor profitable; the Lords found the tradesmen who repaired the ship had an hypothec in the same till they were paid. Forbes, Fountainhall, 16th November 1711, Gay and others *contra* Arbuckle.

Hypothec upon a ship for furnishing.

THERE is a hypothec upon the loading of the ship, for the freight and other duties, similar to *invecta & illata* in urban tenements. Home, December 1683, Mure *contra* Lord Lyon.

Hypothec upon the cargo for the freight.

FOUND, That mariners and seamen had not an hypothecation upon the ship for their wages of the last voyage; yet they had *jus insistendi* and

Mariners hypothec for their wages.

and *retinendi* while in possession of the ship, even against a person who had bought her after the voyage. Falconer, 4th January, Marcus, (*Horning*) Home, March 1682, Seamen of the Golden star *contra* provost Miln. ----- The Lords found seamens wages not a debt of bottomry upon the keel of the ship, or affecting the cargo, but that they are a debt affecting the freight. Forbes, 6th January 1708, Sands *contra* Scot.

No hypothec upon goods for the price.

By our law there is no hypothec upon goods sold, for security of the price. Stair, 14th June 1676, Cushney *contra* Christie.

IDIOTRY and FURIOSITY.

IN a competition for the office of tutory to an idiot, found, tho' agnat in the Roman law signifies one related *per lineam masculinam*; yet with us males descended *ex parte patris*, tho' connected by females, are to be reputed, *in hac materia*, the nearest kinsmen. *2do*. Descendants by a sister german are preferable to the descendants by a consanguinean sister. Forbes, 23d, Fountainhall, 28th February 1710; Moncrief *contra* Maxwell.

THE Lords found it both lawful and necessary, That the king give gifts of curatory to idiots, when the nearest agnats pursue not their interest, without prejudice alwise to the said nearest agnats to serve; in which case they found, That the king's gift does fall. Gilmour, 21st January 1663, Stewart *contra* Spreul. Durie, 22d February 1628, Wardrop *contra* Colquhoun. Fountainhall, 28th February 1710, Moncrief *contra* Maxwell.

A GIFT of tutory to an idiot, past in exchequer, being founded on in a process against the idiot's debtors, the Lords sustained the gift as a sufficient title, tho' there was no brieve of idiotry expedite; but they obliged the pursuer to find caution to make the sums forthcoming to all parties having interest. Gilmour, 21st January 1663, Stewart *contra* Spreul.

A BRIEVE of idiotry, bearing the party to have been idiot from a certain period, a tack granted by him within the time specified, was found null. Fountainhall, 9th February 1704, Maxwell *contra* Bonar.

REDUCTION *ex capite furoris* of an assignation to a moveable bond, may proceed upon a proof of the fury at the time of granting the assignation after the cedent's death, tho' no inquisition of the furiosity had been taken in terms of the act 66th, parl. 1475, during his life. Durie, 26th July 1638, Loch *contra* Dick. ----- In the reduction of a disposition of lands upon this reason, That the disposer was furious; it was alledged for the defender, That by the act 66th, parl. 1475 the furiosity ought to be found by an inquest upon brieves out of the chancery, and now the party is dead, and not questioned in his lifetime. Answered, The act of parliament cited is before the college of justice was instituted, and the Lords of session are now the great inquest of the nation, so they did proceed to try furiosity and idiotry in

in the cause between Gairntilly and Innernytie, for reducing an affigation ; and tho' one party's wounding another during the dependence of a process, and parricide, are, by acts of parliament, to be found by an assize, yet the Lords always proceed to cognosce these crimes without a previous verdict. The Lords, before answer, ordained the witnesses to be examined as to the condition of the party the time of granting the disposition. Marcus, (*Improbation and Reduction*) February 1683, Lindsay *contra* Trent. ---- A reduction of a deed upon the head of idiocy, found relevant after the granter's decease, tho' there had been no brieve of idiocy expedie during his life. Fountainhall, 13th February 1700, Aird *contra* Gib.

IMBECILITY.

IT being alledged against a wife's ratification of a deed, granted with her husband, in prejudice of her jointure, That the same was illicit from her when she was in labour and had her pains, and so was not in a condition to consider what she did, and that it should be looked upon as *mortis causa*, and so is quarelable now after her husband's decease ; the Lords ordained witnesses to be examined *ex officio*, and allowed some women witnesses. Marcus, (*Stante matrimonio*) February 1683, Lady Belford *contra* Scot of Horselyhill. ---- The Lords found it relevant to reduce a discharge subscribed by a woman, that it was offered to be proved to have been presented to her in child-birth pains, which their Lordships judged was an unseasonable time, and that she was then *quasi in lecto*, and *vix satis mentis compos* to have the full exercise of her reasonable faculties. Fountainhall, 7th December 1686, *contra*

*Lectus agri-
tudinis.*

A RELICT having done some deeds *in recenti luctu*, immediately after her husband's death, this was found to be no defence to her against performance, the alledgeance of *luctus* not being warranted by our law or custom. Stair, 24th February 1675, Hamilton *contra* Chiesly.

Luctus

A PARTY alledging, That a discharge of a decreet of spuilzie, and a ratification thereof, which he had granted, was done *in actu amoris*, being at a communing about his marriage, where the woman's friends refused, unless he gave a discharge of that decreet ; the Lords found, That the *actus amoris* might be pretended as a ground to reduce things granted to a wife or her friends, yet not what was done to third parties not concerned in the treaty of marriage. Fountainhall, 14th July 1696, Currier *contra* Rutherford and Hyslop.

Actus amoris

LEVITY without interdiction or fraudulent inducements, annuls no deed, tho' gratuitous. Stair, 24th July 1678, Grierson *contra* Tailzifer.

Levity.

Persons dumb
and deaf.

IN a question of payment of annualrent, the creditor being dumb, the debtor specified, that he delivered the money to the dumb man's sister in his presence, and obtained her discharge, subscribed also by the creditor; this was not found to import a discharge by the dumb man, seeing the money was not delivered to himself, and that neither the delivery nor his subscription could infer that he knew the extent of the sum, or for what cause it was paid to his sister. Stair, 9th July 1663, Hamilton *contra* dumb man in Glasgow.

IMPLIED ASSIGNATION.

The principal conveyed,
accessories follow.

A PERSON infeft in an annualrent-right, having conveyed the same to an assignee who was infeft, the assignee was found to have right to the personal contract betwixt the heritor and first annualrenter, by which the heritor was personally obliged to pay the money, tho' not expressly convey'd, and therefore a conclusion of personal execution against the heritor was sustained at the assignee's instance, as well as real against the ground. Durie, 23d November 1627, Dunbar *contra* Williamson.

ASSIGNATION to a contract whereupon inhibition did follow, was found sufficient to reduce *ex capite inhibitionis*, tho' the inhibition was not assign'd *per expressum*. Haddington, 28th June 1610; Blair of Balgray *contra* Gray.---The like. Hope, (*Inhibition*) 17th January 1622, Hay *contra* Ker. Spotiswood, (*Inhibition*) 21st February 1629, Smith *contra* Henderson.---In a reduction *ex capite inhibitionis*, at the instance of an assignee to a bond, upon which the cedent had led inhibition, the pursuer's title was sustained, tho' the assignation neither mentioned the inhibition *per expressum*, nor contained the general clause, *with all that has followed thereupon*. Home, Marcus, (*Assignation*) January 1682, Williamson *contra* Threapland.

A disposition
of lands
implies a conveyance
of mails and duties.

A DISPOSITION to lands and superiorities is a good title to pursue for rents and feu-duties without infeftment; but the pursuer in this case was found obliged to find caution to indemnify the defender at all hands, upon his paying. Durie, 24th March 1637, Earl of Tullibardine *contra* Robison.

Conveyance
of a subject, to
which the dis-
poner has not
right, if it im-
plies a convey-
ance of all
right in his
person relative
to the subject.

A MAN selling lands under reversion, and thereafter selling them irredeemably to another, the last buyer was found thereby to have right to the reversion; and that he might redeem by virtue thereof, altho' he was not made assignee thereto *per expressum*. Haddington, 24th July 1610, Sheriff of Teviotdale *contra* Eliot. Haddington, 19th July 1605, Ld. Craigie *contra* Boyd.---A disposition carries *omne jus* in the disponent; and therefore a disposition of lands for the life-rent-use of the disponent, was found to carry the reversion, tho' not express'd. Stair, 5th December 1665, Beg *contra* Beg.---A back tack was found to accrete to a woman life-renter, who was infeft after the wadset, she paying the duty to the wadsetter. Hope, (*Liferent*) 18th July 1627, Lady Boyd *contra* her tenants.

A MAN

A MAN having wadset his lands, and taken a back tack for a rent equivalent to the annualrent of the wadset sum, did thereafter grant infestment of annualrent out of these lands; this annualrent-right was not found to imply a conveyance of the back tack; and therefore a renunciation of the back tack, in favours of the wadsetter, was found effectual, tho' granted after the infestment of annualrent. Durie, 18th March 1631, Ld. Clackmannan *contra* Ld. Allardice.---- In a competition between the wife of an appriser infest by him in an annualrent out of the apprised lands, and a posterior adjudger of his right, it was alledged for the adjudger, That his adjudication was the first formal diligence, seeing the husband, who was not infest, could not infest his wife. Answered for the wife, The infestment, *ipso facto*, carried all the personal right the husband had to the subject, and had the effect of an assignation, and the right of the apprising was transmissible by assignation. The Lords sustained the answer, and preferred the wife. Marcus, (*Comprising*) March 1686, Mr. David Dewar *contra* Margaret Wood.---- An infestment of annualrent, containing procuratory of resignation, and assignation to the mails and duties granted by a debtor who had no more in his person but a disposition to an apprising of the lands, was found to be an imply'd conveyance of that disposition, so as to exclude a posterior formal conveyance of the said disposition. Forbes, 19th December 1710, Colonel Erskine *contra* Hamilton.---- A disponent not infest, granting an infestment of annualrent, whether the disposition is thereby carried, debated, but not determined. Home, 4th February 1726, College of St. Andrews *contra* Sir Alexander Anstruther's creditors.

Infestment of annualrent granted by one not infest, what it carries.

A SINGULAR successor in the superiority cannot quarrel the feu *propter non solutum canonem* of any years in his author's lifetime, but only since the conquest of his own right. Haddington, 14th February 1612, Ld. Wedderburn *contra* Nisbet.

Conveyance of superiority, does it carry casualties already fallen?

A VASSAL being year and day at the horn, and then relaxed, after both which the superior sold the superiority, with all rights he had to the land, without having gifted the liferent to any other, the Lords found that the liferent pertained to the new superior. Durie, 19th February 1635, Cuninghame *contra* Stewart.---- A disposition of the superiority to the vassal himself, was found to imply a discharge and assignation of the bygone feu-duties. Stair, 14th December 1676, Earl of Argyle *contra* Ld. M'Donald.

IMPLIED CONDITION.

FOUND, That when a sum is provided to children in a contract of marriage, if any be born, and die in the father's lifetime before getting of a bond of provision, the share of the child so deceased will not transmit to representatives. Marcus, (*Bonds*) February 1682, Sir John Clark of Pennycuik *contra* his sisters and Mr. David Forbes.----- In a contract of marriage, certain provisions being allotted to the children, the portions of the male-children

In a bond of provision payable at a certain age.

dren to be paid at their age of 21, and of the female at 18; these provisions being to an uncertain day, and not conceived to heirs or assignees, any of the children dying before that day, have no right, neither have their assignees or creditors. Stair, 17th January, Gilmour, July 1665, Edgar *contra* Edgar.---- The like. Stair, Gosford, 22d February 1677, Belches *contra* Belches.---- Fergus M'Cuby having, by his bond, obliged himself to pay 1000 merks to his nephew by a second brother deceased, at his age of 21 years, and to aliment him in the mean time; the creditor left 2000 merks, by way of legacy, to his mother's relations, and died before he was 21 years old; and the legatary having pursued for payment, it was alledged for the defender, The words, *at his age of 21*, are a part of the obligatory clause, and a condition which did not exist, and this sense may be the more easily admitted, seeing the bond bears love and favour. *2do*, The bond is conceived in favours of the defunct personally, and to heirs and executors. Answered, That the clause imports not a conditional obligation, but only a delay of payment, and altho' the bond bears love and favour, it obliges the creditor to renounce all interest he could claim by the death of his father or grand-father, which makes it onerous. *2do*, Assignees not being excluded by any taxative clause, the bond was assignable, and also might be legated. The Lords found the bond to be pure and not conditional, and decerned the defender to pay the legacies, the legatar securing him *pro tanto* against the defunct's nearest of kin, which was the quality of the bond. Marcus, (*Bonds*) 25th November 1686, Kelfo *contra* M'Cuby of Knockdolan.

Payable at
the grantor's
decease, or at
a distant term
certain.

ONE Eliot having granted a bond of provision to his second son and daughter, payable to them, their heirs and executors the next term after the grantor's decease, in the end whereof it was provided by a distinct clause, That notwithstanding the payment was provided to be at his death, yet the money should not be payable by his heir, till they, *respective*, attained to the age of 16 years, *under which condition these presents are granted, and no otherwise*; the Lords found, That the clause imported a condition, being *inter liberos*, and was not *prorogative termini solutionis*, and that the same did not belong to their executors, unless the children attained to 16 years, tho' here there was no substitution or return mentioned. Marcus, (*Bonds*) July 1687, Moir *contra* Moir.---- A man granted a bond of provision to his grand-child for love and favour, payable the first term after his decease; this was argued to be of the nature of a conditional legacy, which could have no effect, the creditor having predeceased the grantor; the Lords found the bond fallen by the predecease of the grand-child. 14th January 1730, Bell *contra* Davidson. But a reclaiming petition being offered, the matter was finished by a transaction.---- A father having granted his second son a bond of provision, payable five years after date, the son dying before the term of payment, the question occurred, If this bond was payable to his assignee; It was argued, That it was conditional, *viz. If the son should happen to survive the term of payment*, equally, as where such bonds are conceived payable at a certain age, which are never due, if the children arrive not to that age. Answered, That *dies incertus habetur pro conditione, non dies certus*. The Lords found the bond valid and assignable by the son, notwithstanding

standing he died before the term of payment. 7th December 1717, competition betwixt Campbell of Calder and Ruth Pollock.

A FATHER made a bond of provision in favours of his children, obliging himself to pay each of them a certain sum, with this clause, *That if any of them should decease without heirs of their own body, their share should accresce to the rest of the bairns surviving.* Two of the children having died before their father, the Lords found no action at the instance of the survivors for the defunct's share, in respect the bond remained still in the father's hands during his life; and therefore as the bond never became a delivered evident in favours of the two predeceasing children, their substitutes could carry nothing. Durie, 13th November 1624, Wallace *contra* Wallace. --- In a similar case, where the provisions to the respective children were payable the first term after the father's decease, the contrary was found, and the settlement interpreted to be a conditional institution in favours of the survivors, and consequently to take place, tho' the children who predeceased had never any right, having not only died before their father, but before their bond of provision became effectual by death or delivery. Fountainhall, Forbes, 14th December 1710, Smith *contra* Smith. --- The like was found. Home, January 1726, Denholm *contra* Denholm.

Bond containing substitutions.

A PARTY having granted an assignation *omnium bonorum* which should belong to her the time of her decease, reserving her own life-rent, with a faculty to alter *etiam in articulo mortis*; the Lords found this to be *donatio mortis causa*, and therefore void by the cedent's surviving the assigney; and found, That the subject belonged to the cedent's executors, tho' the faculty was never exercised by the defunct. Forbes, 7th March 1707, Dr. Irvine *contra* Skene. --- A donation *mortis causa* being granted by a man to his niece, of his whole moveable effects, to her, and the heirs of her body, which failing, to her other heirs and assigneys whatsoever, with the burden of his just and lawful debts; found this disposition not vacated by her predeceasing the disponent, but that the succession was open to her other nearest of kin, she having died without heirs of her body. November 1730, Galloways *contra* Hunter.

Inassignations *omnium bonorum*.

It being provided in a contract of marriage, That if the wife happened to die without children, the half of the tocher should return to her father, his heirs and assigneys; and the case having existed, the Lords, in a process at the instance of the father's heir (himself being dead before his daughters) found, That this not being the case of a legacy, but of an onerous contract, the half was payable *quandocunque* the condition existed, and therefore decerned for the heir. Fountainhall, 19th January 1699, Duncan *contra* Smeton. Fountainhall, 15th February 1688, Cuthney *contra* Smeton.

The above implied conditions have no place in onerous deeds.

A LEGACY being left in a testament to a nephew, named with two others, to be tutors to the testator's children, he refusing to act as tutor, was found to have no right to the legacy. Stair, Dirleton, Gosford, 2d February 1675, Scrimzeour *contra* Wedderburn. Dirleton, obligation.

The end failing, with a view to which the deed was granted, if this will loose the ton, obligation.

ton, Gosford, 16th June 1675, Thomson *contra* Ogilvie.---- A party having granted bond to three persons, narrating, That at the granter's decease, they had accepted the oversight of his interment, and curatory of his children, which would require trouble and expences, and therefore obliging himself to pay a sum equally among the three, &c. the Lords found the bond effectual in favours of one of these overseers, who died a little after he had been at the interment of the granter of the bond; the term of payment being elapsed, altho' he had not been at trouble and expence in overseeing the children. Forbes, 24th July 1707, Rule *contra* children of Reid.---- A yearly pension during life being granted to a minister, by a person of quality, bearing to be given for the great pains taken, and to be taken upon the granter's vassals in the parish, and for love and favour, and bearing another clause, whereby the minister accepted the same in satisfaction of all he could crave of his Lordship for his service; the Lords found, notwithstanding the minister was transported to another parish, and his place in the former supplied by a new intransit, that the pension was still due during life, altho' he served not the cure there; and the pains to be taken *in futuro*, was found not to be the *final* but the *impulsive* cause only, the failing of which could not evacuate the pension, seeing it was given for life. Durie, 25th March 1629, Lord Coupar *contra* Dr. Strang.---- A bond of pension granted to an advocate during his lifetime, bearing for services done and to be done, was sustained, tho' the pursuer did not offer to instruct, that he did any service after granting of the pension; and tho' the defender offered to prove, that the grantee thereafter left his employment as advocate, and became town clerk of Aberdeen. Stair, 3d December 1661, Jamieson *contra* M'Leod.---- A pension granted to an advocate, for services done and to be done, during life, was found effectual, unless the advocate refused the granter's service, or served against him. Stair, 26th July 1678, Weir *contra* Earl of Callender.---- A pension being granted to an advocate for life, *in consideration of bygone kindnesses, services, &c. and in respect the granter had left the charge of his law affairs upon him*, was found not to subsist after the grantee was made a Lord of session, because the condition then failed, in view to which the bond was supposed to be principally granted, *viz.* the management of the granter's law affairs. November 1729, Lockhart *contra* Purvis.---- A curator having contracted a young woman, his minor, to a near relation of his own, binding himself to pay a tocher with her, and of the same date taking a disposition to her whole effects; this disposition, presumed granted *intuitu matrimonii*, was found ineffectual, the woman dying before marriage. Stair, Gosford, 18th February 1669, Trinch *contra* Watson.

A final settlement overturned in one particular, how far effectual as to the remainder.

A FATHER upon death-bed disposed his whole lands to his eldest daughter; and appointed her executrix and universal legatrix, with this provision, That she should pay 10000 merks to the other two daughters; the disposition being reduced as upon death-bed, it was found, That the two younger daughters could have no share of the 10000 merks, it being evident, that the defunct did not design, that they should have both the 10000 merks, and also two third parts of the land estate. Stair, 1st February 1671, Pringle *contra* Pringle.----- A person to whom John Suittie had disposed a considerable real and personal estate, to the value

value of *L.* 5000 sterling, with the burden of *L.* 1000 sterling to another, being pursued for the legacy; alledged, That the said legacy was left with a view, that the defender was to get the whole fortune, whereas the real estate, which is the greatest part, was evicted by the heir in a reduction *ex capite lecti*; and therefore the legacy ought to suffer a proportionable abatement, as being in so far *legatum rei alienæ*; and as the defender was preferred to the legatar in getting the disposition, it is to be presumed the defunct intended the greatest share of the estate for him who was obliged to take the disponent's name and arms; whereas if the pursuer get the whole legacy, after the payment of debts, the defender will have no benefit by the disposition. Answered, The pursuers, who are the defunct's aunts, are more favourable than the defender, who is a remoter relation. *2do*, The disposition being burdened with the legacy, and an irritancy adjected in case it should not be paid, this imports, that *in omni eventu*, the whole legacy was to be paid. The Lords decerned for the whole legacy, and ordained the defender to pay, or assign the defunct's estate. *Harcus, (Executry)*

February 1688, Stewart Kettlefson's three daughters *contra* James Hay; but found annualrent not due for bygones *Ibid.*----John Earl of Dundonald, by a bond of entail, made a total settlement of his estate to the heirs of tailzie therein expressed; two days before subscribing this tailzie he executed bonds of provision in favours of his daughters, and at the same time made a will in relation to his moveables; which deeds jointly taken, and in effect executed at the same time, and kept by him undelivered, made a total settlement of his estate, and shewed his firm intention, that the lands should descend to his heirs of entail, and that the ladies, his daughters, should have nothing but their provisions. After the said Earl of Dundonald's death, it being discovered, That some of the lands contained in the tailzie had never been habily vested in the tailzier, but were still *in hæredetate jacente* of a remote predecessor, the lady Strathmore and lady Katharine Cochran, his two daughters, insisted in a declarator, That, as heirs of line to the said remote predecessor, they were intitled to serve themselves in these lands that remained yet in his *hæreditas jacens*; this was opposed by the heir of tailzie, for whom it was pled, That they could not approbate and reprobate their father's will, if they accepted their bonds of provision they could not quarrel the tailzie; and if they quarrelled the tailzie, that they must renounce their provisions. Answered, The bonds are conceived simply, and absolutely without any condition; and the accepting thereof cannot cut them out of any other right, competent to them; That one cannot approbate and reprobate, the same individual deed, which would be an inconsistency, but there is no inconsistency in one approbating a deed which the granter had power to make, and at the same time reprobating another deed which the granter had no power to make. Replied, Since the Earl of Dundonald granted these provisions to his daughters upon this very cause and consideration, That they were to have nothing else out of his estate; and since he burdened his heirs of tailzie with the payment thereof, upon this very cause and consideration, That they were to have the fund out of which these bonds were to be made effectual; it follows, That if the ladies chuse to quarrel their father's settlement and obtain another provision out of his estate, the provisions must fall to the ground

as *sine causa*. Found, That the bonds of provision and bond of tailzie are to be judged as of the same date, and as one total settlement, made by John Earl of Dundonald of his whole estate; and that the pursuers cannot have access to such of the lands, contained in the said tailzie, as were in *hereditate jacente* of their grandfather, and provided to descend to the heirs of line, without quarrelling or impugning of the settlement made by their said father; and that therefore they are not entitled to claim both their bonds of provision, and likewise their succession to the said lands, which were in *hereditate jacente*, but that they are entitled to claim either the one or the other at their option. 20th February 1729, Countess of Strathmore and Lady Katharine Cochran *contra* Marquis of Clidestdale and Earl of Dundonald.

Obligation granted upon supposition of a fund of payment, which the granter is afterwards deprived of.

IN the year 1688, the Dutchess of Buccleugh being at that time possessed, by a gift from the crown, of the Duke of Monmouth's personal estate; in consideration of this, and that her son, the Earl of Delorain, was not otherwise provided, she granted him a bond of provision of L. 20000 sterling. The Duke's forfeiture amongst others being rescinded by the general act rescissory in the year 1690, the Earl of Delorain upon that *medium* insisted in a process against her grace, to accompt to him for the Duke of Monmouth's personal estate, having right thereto as executor decerned to the Duke his father; the Dutchess did not oppose the action, only craved, That the bond for L. 20000 sterling, granted and paid by her to her son, the pursuer, might be imputed *pro tanto* in satisfaction of his claim; and it was pled for her, That it never was intended my Lord Delorain should have both the bond and his father's personal estate; the bond was granted when my lady Dutchess had no fund to answer it, other than this personal estate, having no power to charge it upon the entailed estate; and therefore as the bond was plainly given in contemplation of the Dutchess's having this subject, it being taken from her, the bond must fall to the ground as *sine causa*; it was answered, There is a great difference betwixt the cause of granting a bond, expressed in it, to make it effectual, and those by-views or motives, which possibly may influence the granter, and even determine him to make the provision greater or lesser. The Lords found the bond of provision, by the Dutchess to the Earl of Delorain, must impute, at least, *pro tanto*, in satisfaction of the claims for which the Dutchess, in virtue of the act rescissory, might be accomptable to the Earl as executor to his father. 7th December 1723, Earl of Delorain *contra* the Dutchess of Buccleugh.

Renunciation granted upon the same supposition.

A LADY's jointure being reduced by a creditor who had inhibited before her contract of marriage, and she thereafter, claiming a terce, as if she had not been provided at all; this the Lords refused, because, that having once founded on her contract of marriage, and renounced all terce, &c. she could not recur thereto. Fountainhall, 9th February 1697, creditors of Balquholly *contra* the Lady.

Obligation granted upon an expectancy, how far the disappointment vitiates the same.

THE heir-male having ratified a disposition of part of his brother's lands in favour of the said brother's lady, and obliged himself to purge incumbrances affecting the same, and this as exprest in the deed of ratification, upon the view and in contemplation of succeeding to the rest that

of the estate ; and after his brother's death, being charged by the relict upon his ratification to purge incumberances, the Lords found this reason of suspension relevant, viz. That there was an expired comprising against the defunct, unpaid at the time of subscribing that ratification, which would evacuate and carry away the estate from the heir of tailzie, so that he could not enter ; and found, That the ratification implied a condition, in case he did, and could succeed, unless the relict offered to prove by the heir's oath or writ, That he knew of that comprising standing out unsatisfied at the time of signing that ratification. Fountainhall, 19th, Falconer, 23d December 1684, Home, March 1685, Dutcheffs of Lauderdale *contra* Earl of Lauderdale.

----- A man during his treaty of marriage falling sick, and on his death-bed gifting to the woman his signet-ring ; giving her also two bonds, and then declaring, That in case he died before his assignation to her of the same were framed and subscribed, she should detain them till she were paid of a sum equivalent to that in the bonds ; and having died without consummation either of the marriage or assignation, the Lords found, That she had no right to the bonds ; but as to the ring, if there was *interventio osculi*, the same, as *delibatio quædam pudicitie*, gave her absolute right thereto. Fountainhall, 4th June 1697, Deans *contra* Tod. ----- A post in the king's gift, being sold, so as the present possessor was to officiat till the next term, and then demit in the buyer's favour, without being bound to procure him a new commission ; and the seller dying a little before that term, so that the buyer had not time to make his interest at court, but was prevented by another ; the Lords, in a process for repetition of 4000-merks, which he had paid to the seller, *condictione causa data, causa non secuta*, affoizied the seller's representatives, but allowed the pursuer 1000 merks out of the 4000, for the expence of his journey to London in contemplation and prosecution of the bargain, conform to *L. 5. pr. ff. D. Tit. de Cond. caus. dat.* Fountainhall, 9th December 1686, Davidson *contra* Wauchop. ----- A bond granted to the treasurer by an apparent heir, during his father's sickness, for composition of his marriage, tho' the marriage fell not, the father having reconvalesced, yet the bond was sustained. Haddington, 5th December 1609, Arnot *contra* Ld. Ballaggar.

THE marquiss of Montrose having granted a bond for 800 merks yearly to lady Jean his sister, expressing to be for her aliment and subsistence ; and the said lady Jean having afterwards, through the moyen of the late marquiss, son to the granter, obtained a yearly pension of L. 100 sterling from the king, she neglected several years to call for the 800 merks, but at her death she legated L. 150 sterling to the lady Gray, with whom she had stayed, and 2000 merks Scots to the physician that had attended her eleven years ; which legatars pursued this young Earl ; alledged for the defender, That the testator having a sufficient fund of aliment, by the L. 100 pension, the impulsive cause of the bond ceased, especially considering, that the pension was procured by the defender's father ; the Lords decerned, because tho' the aliment was the impulsive cause of the bond, it did not cease to be effectual by the supervenient accession of the pension. Marcus, (*Aliment*) 13th July 1688, Gray of Crichton *contra* marquiss of Montrose.

Alimentary provision, will it fall when the creditor comes to be otherwise provided ?

Impulsive
cause false.

THE Lords sustained a bond bearing borrowed money, and renouncing all exceptions in the contrary, altho' it was granted for the cure of a disease, and the debtor offered to prove, That the same was not effectually cured, but the fore broke out after granting the bond worse than ever, through the creditor (who was a physician) his ignorance and negligence. Forbes, 24th December 1708, Doctor Trotter *contra* Tailzifer.

Condition
fi sine liberis.

ONE having lent a sum, and taken a bond for the same, payable to himself and to his children, mentioned *nominatim* in the bond, equally and proportionally amongst them in fee, with this provision, " That " in case of the decease of any of the said children, the aforesaid sum " shall be equally divided amongst the survivors ; " The Lords found the condition *fi sine liberis* implied, and that the share of one of the children, who deceased before his father, did, notwithstanding the substitution, descend to his children. 21st November 1738, magistrates of Montrose *contra* Robertson.

CLAUSES when understood conditional, when simply mutual. See *Mutual Contract*.

Implied DISCHARGE and RENUNCIATION.

Acting as
superior by
receiving ca-
sualties of su-
periority, if it
imply a dis-
charge of any
claim to the
property.

FOUND, That a superior is understood to pass from the recognition, if after incurring thereof he receive the services used and wont for the lands in question. Balfour, (*Recognition*) 4th March 1502, the king *contra* Lord Seaton. 14th January 1509, the king *contra* M'Dougal. 23d February 1505, the king *contra* Lord Lindsay. ---- A superior of feu-lands having obtained the gift of his vassal's liferent-escheat, and declared the same, insisted for the mails and duties since the declarator ; it was alledged, That he had accepted the feu-duty of several years since the declarator, and thereby had tacitly past from the declarator. The accepting the feu-duty was found relevant only for these years for which it was received. Stair, 6th June 1666, Earl of Cassils *contra* Agnew. ---- A superior obtaining decret of improbation against his vassals, and receiving the feu-duty of that same year by a discharge posterior to the decret ; the Lords found, That the decret needed not be reduced, as being thereby *simpliciter* passed from. Gofford, 6th June 1671, Steel *contra* Hay. ---- The Lords found, That a subject superior his accepting feu-duties after he knew that a recognition was incurred, was a passing from that casualty ; tho' it was alledged from Craig *de feudis*, That *argumentum a foris factura ad recognitionem* was good ; and that the taking feu-duties from a traitor would not infer a remitting the forfeiture ; *ergo*, the same in recognition. Fountainhall, 15th December 1687, Wilson *contra* Smith. ---- Their Lordships decerned in a recognition, notwithstanding that the superior, after

after it was incurred, and he knew it, accepted of the feu-duties and other casualties, which was alledged a passing from the recognition, and acknowledging that the defender still continued his vassal. Fountainhall, 14th January 1696, Ld. Carnwarth *contra* creditors of Nicolson. ----- In a declarator of recognition of a feu, the Lords sustained a defence in these terms, That since the recognition fell, the superior himself, or his factors by his order, had accepted the feu-duty from a singular successor, whom he knew not to be entred by himself, which infered his consequential knowledge of the recognition its being incurred. Fountainhall, 11th February 1697, Cockburn *contra* Law and others. --- The superior receiving any part of the feu-duty, cannot thereafter reduce *ob non solutum canonem*. Balfour, 28th July 1553, Bishop of Dunblane *contra* Chisholm.

FOUND, That the superior's precept of *clare constat*, given to the feuar, was a discharge of bygone feu-duties. Haddington, 14th February 1612, Ld. Wedderburn *contra* Nisbet. ---- Found, That a precept of *clare constat* given, without any reservation, by a superior to his vassal, whereupon he was infeft, purged not only bygone feu-duties and the entry, but also ward-duties intromitted with by the vassal before the entry, unless the superior had gifted these casualties to some other before the precept. Home, Marcus (*Ward*) February 1682, Earl of Cassils *contra* Lord Bargeny. See Falconer, 7th January 1682, *inter eosdem*. ---- A precept of *clare constat*, granted after recognition, was found to imply the superior's passing from the recognition. Stair, 24th June 1668, Gray *contra* Howison.

AFTER the ward is fallen, tho' the superior receive an appriser, apprising from the minor heir, without protesting for a reservation of his ward, yet it was not found to prejudice his right; for seeing granting infeftments on apprisings are in obedience, they never import a passing from any right competent to the superior, albeit he do not expressly reserve the same. Stair, 19th July 1664, Hospital of Glasgow *contra* Campbell. ---- Granting a charter of apprising, prejudices not the king of the liferent-escheat of the debtor already fallen. Durie, 5th July 1622, donatar to the Earl of Tullibardin's escheat *contra* Adinston. ---- Nor of recognition. Hope, (*Recognition*) 18th February 1614, Ld. Lugton *contra* Ld. Lethindie. ---- Found, That the giving a precept by the superior to the vassal, for leasing him in the lands, specially being a precept in obedience to a retour, prejudged not the superior in the casualty of his vassal's liferent-escheat, the vassal having been year and day at the horn before the precept. Haddington, 1st July 1623, Crawford *contra* Ld. Covington. Durie, 25th July 1623, Lord Ramsay *contra* Earl of Lothian.

IN a declarator of recognition, upon the party's having granted a wadset of more than half of the subject, the Lords sustained a defence of homologation, by the superior his taking a disposition of the land from the wadsetter, tho' blank in the receiver's name, and by his producing the same, and debating thereon in this same process of declarator. Home, July 1687, Ker of Littledean *contra* Law.

Removing
how pass from.

IN a removing, the Lords sustained an exception, bearing, That the defenders had done service to the pursuer since the warning, and that the same was accepted by her, without necessity to alledge the same to have been done at her command, seeing her acceptation was equivalent; but here it was also found necessary that the defenders should alledge, That the foresaid service done by them to her was a part of the old duty accustomed to be paid for the lands. Durie, 12th July 1626, Lady Kilbirnie *contra* tenants.----The like. Balfour, (*Removing*) 3d June 1549, Ld. Blairquhan *contra* Crawford. Balfour, (*Removing*) 20th June 1550, Wallace *contra* Cathcart.----But if the service done be not contained in the tack, it will make no exception against removing. Balfour (*Removing*) 8th January 1563, Boyd *contra* Boyd. Balfour, (*Removing*) 7th November 1569, Stewart *contra* tenants of Eildown.----The same holds, tho' there be a decret of removing. Colvil, 21st January 1579, Lindsay *contra* tenants.-----The master of the ground who receives cudichs yearly from his tenants, whether it be meat and drink, or these converted into money, cannot remove them, if the cudich be given after warning, tho' it be no duty of the ground, but mere benevolence. Colvil,

March 1581, Lord Gray *contra* tenant.----In a removing, the defender founding upon a tack, which, tho' reduced, yet, since the warning he had paid taxation of the same lands for the pursuer's relief, and at her command and direction; the Lords found this not relevant, unless it were alledged, That he had paid it as a part of the tack-duty, because otherwise, if he had not been obliged to do it, it could not prejudice the pursuer, altho' she had desired him, no more than if she had desired any stranger to do it. Durie, Spotiswood, (*Removing*) 5th March 1629, Lady Borthwick *contra* Scot.----In a removing, the Lords found, That a receipt of the Whitfunday's mails, (at which term the warning was given) and of the terms of the crop sown and growing the time of the warning, prejudices not the said warning, but only in case it be for the farm of a subsequent crop. Haddington,

March 1594, Lord Spynie *contra* tenants of Bothwell.----Service done by the tenant after the warning, and before the term of removing, was found not to invalidate the warning. Haddington, 14th March 1612, Hairstones *contra* his tenants.----A voluntary receiving of mails and duties after a decret of removing, is understood to be a passing from it, if it be rent that fell due after the term of removing, but if the master suffer the tenant to remain for another term, he may pursue for mails and duties, without prejudice of his decret of removing; for if a tenant will unlawfully detain possession, both remedies ought to be competent, the one without prejudice of the other. Gofford, 24th June 1671, Main *contra* Marth.

Accepting a
tack, implies a
renunciation
of the property.

ACCEPTING of a tack, found to take away an infeftment formerly proceeding from the same author. Spotiswood, (*Removing*) November 1583, Cuninghame *contra* Cook. See Haddington, 23d January 1611, Ld. Philorth *contra* Ld. Pitligo.

Accepting a
new tack, how
far it implies a
renunciation
of a former?

ACCEPTING of a new tack for a greater duty, is a discharge of the former. Auchinleck, (*Tack of Tiends*) February 1630, minister of Kirknewtown *contra* Lord Balmerino.----The taking a short

short tack prejudices not the tenant of a longer, or of a rental which he had before, because they are compatible, unless they differ in *substantialibus*, v. g, grassums, duties, services, &c. Maitland, 18th December 1565, Sinclair *contra* Manderston.---- Found, That an heritor having a tack of tithes, and taking a new tack from a new titular, after expiring thereof, may turn to his first tack, especially if he never entred in payment of the duty in the last tack. Gosford, 24th June 1669, Jeffray *contra* heritors of Muckwood and Grange.---- Taking a right to a second tack from a third party, infers not a passing from the former, unless the posterior tack had a greater duty or shorter durance, and that the tackfman had paid the greater duty, or bruiked expressly by the latter tack. Stair, 24th June 1669, Kennedy *contra* Jeffray.---- But accepting a second tack from the granter of the first, bearing a different commencement and duty, was found to import a passing from and innovation of the former; tho', in the second tack, the former was expressly ratified, which was understood to be a *protestatio contraria facto*. Stair, 23d January 1678, Duke of Lauderdale *contra* Earl of Tweddale.

THO' the feu charter contain a conventional penalty, that the superior may poind the ground for double the feu-duty, upon failure of payment at the times appointed, yet that does not exclude the legal penalty upon the act of parliament. Durie, Auchinleck, (*Feu-duties*) 20th February 1633, Lennox *contra* M'Moran.

Conventional penalty excludes not the legal penalty.

THERE being a clause irritant in a contract among some tacksmen of the customs, and it being alledged, That one of them had incurred the irritancy, the Lords found the same purged, in so far as after the failzie, the parties acknowledged him as still partner, by admitting him to their meetings, and submitting their accompts to him as one of their partners. Hope, (*Clause irritant*) 22d December 1612, customers *contra* M'Math.---- The Lords found, That the receiving of duty from the tenants, to whom the rental was assigned, purged the failzie, it being proved, That the master knew that the rentaller had disposed his rental to them. Hope, (*Rental*) 20th March 1623, Ld. Craigie *contra* his tenants.

Irritancy incurred, how past from?

TAKING payment of the old tiend-duty, tho' but for one year, was found a passing from a preceeding inhibition, so that the tenants were liable for no more than the said duty for all years, whether before or after the payment, until a new inhibition were served, but payment of a pension due to the pursuer out of the tiends, was not found to import a passing from the inhibition, but only imputed *pro tanto*, in so far as they had paid. Durie, 25th March 1628, Lord Blantyre *contra* parishioners of Bothwell.---- In a spuilzie of tiends, the Lords found, That the receipt of a peck of oats and a trufs of straw, which was a part of the old duty, was sufficient to take away an inhibition. Hope, (*Tiends*) 10th July 1615, Balfour, Lord Balmerino and Glending *contra* tenants of Parton.

Inhibition of tiends, how past from?

A REVERSER being charged after a requisition of the wadset sum used against him, the Lords suspended the letters, because the wadsetter had continued after the said term to possess, eat up the grass, &c. Requisition or premonition, how understood past from?

&c. whereby their Lordships found, That he had tacitely past from his requisition; and this notwithstanding his offer to satisfy for the grass eaten by his goods since that term. Durie, 12th July 1625, Henryson *contra* Earl of Linlithgow.

Decreet-arbitral.

A DECREET-ARBITRAL being pronounced upon a submission, and the parties having of new submitted the matter, the former sentence was still found to stand, seeing nothing had followed upon the new submission, and that it was now expired, nor had either party expressly renounced the former decret. Durie, 22d March, 1634, Ld. Hartwoodmyres *contra* Turnbull.

Legal exception.

A PARTY who had been pursued in the court of king's bench in England, having found bail, and the pursuer giving a release and discharge to the said bail, upon the defender his giving a declaration, that the pursuer's granting that discharge was nowise meant to exclude him from any advantage he had by the decree of the king's bench for recovery of the debt; the Lords found this declaration, upon releasing the cautioner, was a ratifying the king's bench's decree, whether defective or not, and that it was a passing from any defence the defender had to quarrel the same. Fountainhall, 13th July 1709, Goddard *contra* Swinton.

Provision of conquest.

A DAUGHTER in her contract of marriage accepting of a clause, making her *a bairn in the house*: This was found to imply a renunciation of the conquest provided to her in her father's contract of marriage. Fountainhall, 7th July 1698, Dalrymple, 20th January 1699, Cumming *contra* Kennedy.

Conventional provision how far it implies a discharge of the wife's legal provisions.

A BOND being granted to husband and wife, the longest liver of them two, and the heirs procreated betwixt them, without clauses of infestment or annualrent; it was found, That the relict might have choice of the liferent, or of half of the sum, being moveable *quoad relictam*; but that she could not have both. Stair, 24th June 1663, Scrimzeour *contra* Murrays. --- A wife in her contract of marriage, being provided to her liferent of all goods and gear conquest during the marriage, moveable and immoveable; in this case it was found, That she could not have both her third and the liferent of the rest; but she got her option either of the third *provisiōe legis*, or of her liferent of the whole *provisiōe hominis*. Stair, 20th December 1664, Young *contra* Buchanans. --- Found, That a relict should not have both a liferent and a third, but should have her choice or option of either. Dirleton, 26th July 1666, Menzies *contra* Burnets. --- A wife, in her contract of marriage, being provided to the liferent of all sums and goods acquired by her husband, before or during the marriage; the Lords found, That she could not both claim this liferent and the property of the third of moveables, because the liferent of the whole is inconsistent with the property of any part; but seeing of consent she had drawn a third of the moveable sums and goods, they found, she could not claim the liferent of the other two thirds, except the sums bearing annualrent, whereof the law gives her no share, over which her provision of liferent was sustained, notwithstanding of her drawing a third of those goods that were simply moveable. Stair, Dirleton, 2d February 1677, Holms *contra* Marshal. --- A liferent provision to a wife

wife in her contract of marriage, being an annualrent, was found not to exclude a terce of the same lands; but the Lords would allow it only out of the superplus of the rent of the lands more than the annualrent. Stair, 25th January 1681, Morison *contra* Lady Craigleith. See act 10th Parl. 1681.

THE king's confirmation of a base infeftment frees not from the ordinary casualties of superiority falling by the subject superior, such as ward. Hope, (*Ward Confirmation*) 1st July 1629, Lady Cathcart *contra* vassals. ---- The like, where the superior was taken consenter to a base infeftment of annualrent. Marcus, (*Ward and Marriage*)

Confirmati-
on of a base in-
feftment se-
cures not from
ward or other
ordinary casu-
alties.

January 1687, Duke Queensberry *contra* Gordon. ---- Except feus, which are secure against the ward, granted with consent of the superior, in virtue of the act 1606, chap. 12. Gosford, 28th June, Stair, 1st July 1672, Earl of Eglington *contra* Ld. Greenock. As to which see *Feu*.

A WADSET being granted to be held *a me & de me*, containing a back-tack to the reverser, for a duty equivalent to the interest of the money; the king's confirmation of the wadset was found not to secure the back-tack, in prejudice of the ward which arose upon the wadset-ter's death. Marcus, (*Ward*) 15th February 1686, Lord Chancellor *contra* Brown.

CONFIRMATION excludes not the superior or his donatar from the casualties of superiority fallen before the confirmation, which are consistent with the right of property, excluding only recognition and such like, totally subversive of the right of property; which was found, with regard to a liferent-escheat gifted after confirmation. Stair, 14th January 1676, Ayton *contra* Duncan. ---- The like, with regard to the king's confirmation of a base infeftment. Forbes, 10th, Fountain-hall, 17th February 1710, Lesly *contra* creditors of Riccarton-Craig. ---- Yet it had been found, That the king, by confirming an apprising, was barr'd from the liferent-escheat already fallen. Spotiswood, (*E-scheat*) 26th November 1624, Ld. Coulter *contra* Ld. Balbegno. ---- And that his consenting to a wadset granted by his vassal, did imply a renunciation of his vassal's liferent-escheat *quoad* the wadset. Stair, 19th June 1669, Scot *contra* Langton.

If it secures
from liferent-
escheat?

THE king's confirmation of a right to part of the ward-lands granted by the vassal secures against posterior recognitions, but not against these already incurred; which cannot be done without a *Novodamus*. Stair, 6th February 1673, Lord Hatton *contra* Earl of Weemyss. ---- The contrary found, *viz.* That a confirmation after the major part is alienated, and before the gift, doth secure the right confirmed. Hope, (*Recognition*) 28th February 1612, Rae *contra* Lord Kellie. Falconer, 23d February 1683, his majesty's advocate *contra* creditors of Cromarty. ---- The like. Marcus, (*Recognition*) vassals of Dundee *contra* Earl of Lauderdale. And that equally whether the confirmation is of a base or publick infeftment.

Secures from
recognition,
tho' incurred.

AN alienation made by a ward vassal, confirmed by the superior, before recognition be incurred, is not only safe from recognition, but can-
brought *in computo* by the superior, to infer recognition against other alienations?

If a base
right confirm-
ed can be

not be brought *in computo* with after alienations to infer recognition ; but where the major part is alienated, the confirmation of any one of the alienations will not relieve the others from recognition already incurred, tho' laying aside the subject confirmed, the others do not extend to the one half. Falconer, H Marcus, (*Recognitions*) 23d February, 1683, his majesty's advocate *contra* creditors of Cromarty.---The like, H Marcus, (*Recognition*) vassals of Dundee *contra* Earl of Lauderdale.

If it can be brought *in computo* by the vassal to save from recognition ?

As a base right confirmed cannot, by the superior, be brought *in computo* with after alienations to infer recognition ; so neither can it be brought *in computo* by the vassal, with the part of the fee that remains indisposed, to make up the major half, and thereby to avoid recognition ; for the Lords found, That base rights confirmed do subduce from the rental of the barony, and, in a question of recognition, are no more to be considered than if they had never been parts of the barony. H Marcus, (*Recognition*) July 1687, Earl of Lauderdale *contra* vassals of Dundee. --- But the Lords inclined to be of opinion, That the duty contained in these base charters, and the real worth of the superiority, was a subject that remained with the disponent, and might be brought *in computo* to make up the major half not disposed of. H Marcus (*Recognition*) March 1683, Hay *contra* creditors of Muirie.

Publick infestment of the whole lands does not save from recognition, if the base infestments, granted by the purchaser and his author, extend above the half.

CONFIRMATION of a base right must save from recognition, *quia hoc agitur* by the confirmation ; or, if a particular part of the barony be disposed to be holden of the superior, a charter of resignation or confirmation, will also save that part from recognition : But where the whole ward-lands are disposed to be holden of the superior, a charter of resignation or confirmation will have no effect to save from recognition, because no more is intended thereby, than to receive one vassal in place of another, subjected to the same burdens and to the same grounds of challenge that lay against the former vassal ; and therefore, in this case, the deeds of the author will be conjoined with those of the singular successor to infer recognition, as if all were granted by the same person. Stair, H Marcus, (*Recognition*) 7th July 1681, Hay *contra* creditors of Muirie.

But a publick infestment of part of the lands, is safe against recognition, if not already incurred.

A PURCHASER of a part of a barony holding ward, being infest upon a charter of resignation, which imports the superior's consent, no base right thereafter granted by the author can be brought *in computo*, to subject the publick infestment to recognition. Falconer, 15th March 1683, Hay *contra* creditors of Muirie. --- But a charter of resignation will not save the lands contained in the charter from recognition, where the major part was alienated before the date of the resignation. H Marcus, (*Recognition*) Falconer, 20th March 1683, *inter eosdem*. --- And as to base rights granted by the resigner after resignation, before the same is completed by infestment ; the Lords found, That such rights, granted before subscribing of the charter in the case of private superiors, and before appending of the great seal, where the king is superior, are to be brought *in computo* to infer recognition of the lands resigned, notwithstanding of the resignation. And the reason of the difference betwixt the king and a subject superior, is, that the king's consent is not completed till the great seal is affixed, tho' the

the signature be past his majesty's hand, and compounded in exchequer; but in this case, there being no base saline betwixt the appending of the seal and taking infeftment upon the charter of resignation, it was not determined whether a base infeftment, granted in these circumstances, behoved to be brought *in computo* to infer recognition of the lands resigned. Marcus, (*Recognition*) *ibid.* See Home, March 1683, Hay *contra* creditors of Muirie.

As a publick infeftment, which is the superior's deed, cannot infer recognition; so neither can such an infeftment be brought *in computo*, with prior base infeftments, to make up the major half to infer recognition of the base infeftments; because there can be no penalty where there is no delict: But then it was pleaded, That at least the publick infeftment ought to be substracted from the ward-vassal's property, as not belonging to him, after which the base infeftment formerly granted would be above the one half; the Lords repelled this alledgeance, seeing the base rights already granted were within the limits prescribed by law, and could not be forfeited where the vassal had done no act contrary to his fealty: But if the base rights had been granted after the publick infeftment, the matter probably had been otherwise determined. Forbes, 21st March 1707, Ld. Grant *contra* creditors of Hallgreen.

A publick infeftment cannot be brought *in computo*, to infer recognition against base alienations.

CLAUSES of *novodamus* in a charter from the crown, are fully extended as to all claims the king has to the property by nullities, forfeiture, recognition, &c. but not to any casualty of superiority, not reaching but burdening the property, except such as are particularly exprest; and therefore found not to import a discharge of bygone non-entries. Haddington, July 1611, Ld. of Coldingknows *contra* Corbie.---- The like with regard to the casualty of marriage. Gosford, 9th, Stair, 17th July 1672, Lord Hatton *contra* Earl of Northesk: But this case was afterwards stopt to be heard in presence.---- The like as to bygone feu-duties. Fountainhall, 16th December 1686, Maxwell *contra* Falconer.----- A charter of ward-lands from a sovereign, containing a *novodamus*, with a change of the holding from ward to blench, with these words, *Non obstante quod eadem terræ per servitium wardæ & relevii antea tenebantur, quam tentionem & omne beneficium ejusdem nos in perpetuum renunciamus & exoneramus*, was found to import a discharge of the bygone casualties of ward. Forbes, 12th February 1713, Erskine *contra* Hamilton.

Novodamus secures against all claims to the property, but not against casualties burdening the property.

As a *novodamus* implies a discharge of recognition already incurred, it comes out to be equivalent to a confirmation of the several base rights whereby recognition is incurred, and it was found to be virtually a confirmation of all anterior base rights, tho' recognition be not incurred so as to hinder them to be conjoined with alienations made after the *novodamus* to infer recognition. Falconer, Marcus, (*Recognition*) 23d February, 1683, Lord advocate *contra* creditors of Cromerty. Stair, 23d February 1681, Hay *contra* creditors of Muirie.

Novodamus virtually a confirmation of all anterior base infeftments.

A SERVITUDE of casting peats in a moss, constituted by a ward-vassal, is not effectual against recognition; nor was it found validated by a charter of resignation granted by the crown, wherein it was expressly mentioned in the charter.

Charter of resignation from the crown implies a confirmation of no base right or servitude, tho' mentioned in the charter.

reserved, seeing resignations pass of course. Stair, 26th January 1681, Edie *contra* Thoirs.

A right of reversion in the superior's person, not hurt by confirmation;

A RIGHT of lands being granted by a superior to his vassal under reversion, and thereafter being conveyed by the disponent, without mention of any reversion, and the last disposition being confirmed by the superior reverser; the Lords found, That notwithstanding thereof the right stood still affected with the reversion, *quia confirmatio nihil novi juris tribuit*. Durie, 20th March 1635, Bishop of Glasgow *contra* Mauld.

Nor does it bar him from reducing *ex capite inhibitionis*.

A CHARTER of confirmation granted to a new vassal, prejudices not the superior as creditor to the former vassal to reduce the disposition in favours of the new vassal, *ex capite inhibitionis*. Gosford, 28th November 1673, Lord Forbes *contra* Garrioch.

Consent implies a *non repugnantia* as to all right at the time in the consenter's presence.

A WIFE provided in an annualrent by her husband, with consent of his father who stood infeft in the lands; found the wife's annuity could not be prejudged by tacks set afterwards by the father, tho' the husband was never infeft. Durie, 15th December 1630, Stirling *contra* tenants. — A wadsetter having disposed his lands, without mentioning them to be redeemable, and the person who was substituted in the reversion being taken consenter, this was found only to import good will, and not to bar the consenter from making use of the reversion, which afterwards devolved upon him by the death of the original reverser. Stair, 23d February 1667, Earl of Errol *contra* Hay of Crimonmogat. — A wife being taken consenter to her husband's disposition of lands, to which she had no right for the time, is not barred thereby from making use of any right acquired thereafter from a third party; consent operating only, that upon any right from her husband, or then in her person, she should not impugn the deed to which she consented; and *jus superveniens* does not apply, a consenter not being an author. Stair, Dirleton, 8th January 1668, Forbes *contra* Innes.

Consent by one who has legal objections.

AN assignation to a sum, being made in testament, to which the testator's wife consented and subscribed the testament; the Lords found, That this did not prejudice her, but that she had still right to her third of the defunct's free gear, and of this sum among the rest; because the assignation being of a testamentary nature, could go no further than the defunct's third. Durie, 4th February 1623, Guild *contra* Guild. — Found, That a wife's consenting to her husband's testament, wherein he leaves sundry legacies, does not preclude nor debar her from her third of the moveables, because the legacies do not affect her share, but only the dead's part; so that they are not *super eodem subiecto*. Fountainhall, 9th July 1687, *contra*. — The like, tho' the sum left in the testament was a bond of provision to a daughter, which the wife could not know by barely subscribing the testament, and had no reason to suspect, that any sums were contained therein save legacies. Stair, 24th January 1674, Murray *contra* Jeffray.

Consent to a disposition of warrandice.

A HUSBAND having sold his lands, wherein his wife had her life-rent-right, and disposed other lands in warrandice, the wife was consenter

consenter in the disposition of the warrandice-lands ; and the question occurred, If this could exclude her from her liferent of the principal lands ? It was argued, That the wife's consent to the disposition of the warrandice-lands, implied, that she was to do no deed whereby the warrandice might be incurred ; and therefore she could not insist for her liferent, which was making the warrandice incur. Answered, The consent implies only, that she should do no deed to make the disposition of warrandice ineffectual ; but the doing a deed to make the warrandice incur, is by no means quarrelling that disposition or endeavouring to make it ineffectual ; on the contrary, it is purifying the dispo-
nee's right to the warrandice-lands, which was before but conditional ; the Lords sustained the answer. Stair, 8th January 1668, Forbes *contra* Innes.

A WIFE'S consent to a minute of a contract of marriage of her daughter, was only found to import her consent to the marriage, not to the clause in the minute disposing the estate without reservation of her liferent, she not being consenter in the principal contract. Stair, 8th January 1679, Lady Knox *contra* Arbuthnot.

Consent to a disposition in a minute of a marriage-contract.

A DISPOSITION being quarrelled as after inhibition, it was alledged, That one who had a wadset of the lands disposed prior to the inhibition, was consenter and joint disposer, which at least carries the wadset free of challenge. Answered, The wadsetter's consent imported not the transmitting of his right, tho' he jointly disposed, seeing he transmitted no part of the sums in the wadset ; and therefore imported a renunciation only *quoad* the lands disposed, which restricted the wadsetter to the other wadset lands not disposed ; so that his consent barely implied *non repugnantia*, which was sustained. Stair, 4th July 1665, Boyd *contra* Kintore.

Consenter and joint disposer.

AN executor nominated having taken decret against the defunct's debtors, and assigned the same to the universal legatar, the acceptance of the said assignation was found to bar the universal legatar from any ground of challenge he had against the executor for neglecting to do exact diligence. Durie, 11th June 1629, Hog *contra* Neving.

One whose trust is taken off his hand, cannot afterwards be challenged for want of diligence.

EXPENCES of plea cannot be acclaimed after decret is extracted, because the party, by extracting his decret, is understood to give up any further claim than what is contained in the extract. Forbes, 26th January, Fountainhall, 1st February 1709, Menzies *contra* Gordon.

Expences of plea cannot be claimed after decret is extracted.

----- But this rule does not extend to damages ; and it was found, That a new process may be raised for these ; or if there was a conclusion for damages in the first summons, that the party may give out his process of new, and insist upon that conclusion. Fountainhall, *ibid.* ----- A creditor having accepted payment of the principal sum contained in a decret, without any mention of an article for expences, also contained in the decret ; this was found to imply a discharge of the expences. Fountainhall, 17th January 1710, Hutton *contra* Earl Forfar. ----- A chamberlain who had no written factory, having accompted with his constituent, and taken a discharge of his intromissions, insisted against the constituent's representatives for a salary ; the defence was, That fitting accompts without an article

for salary, implied either an acknowledgment that none was due, or a discharge, if any was due ; the Lords sustained the defence. Falconer, Home, 5th January 1683, Graham *contra* Rothead.

IMPLIED OBLIGATION.

A PARTY being bound to infest another, the obligant himself must bear all the expences of the infestment, unless the contrary be specially agreed upon. Maitland, 15th February 1557, Ld. Colston *contra* Hoppringle. Colvil, March 1583, Hall *contra* Peebles. Spotiswood, (*Conjunct fee*) 17th February 1629, Pringle *contra* M'Dowgal. ----- A party being obliged to infest holden of the king, and not being expressed *cujus expensis*, the Lords found, That it ought to be upon their equal expences. Hope, (*Expences*) 29th July 1618, *contra*

A PARTY being bound to infest a lady in an annualrent, and being pursued for the same, not to infest, but *personali actione* for the sums, the Lords found, That he being obliged to give infestment, was bound *hoc ipso* to make payment ; and therefore sustained the personal action for payment. Durie, 17th January 1622, Hamilton *contra* Sinclair. Durie, 23d December 1630, Ogilvie *contra* Lord Ogilvie.

LANDS being wadset under reversion, and the infestment being publick, altho' there was no obligation to resign upon an order of redemption, yet the wadsetter was found obliged to subscribe a procuratory and resign, having nothing to say against the order of redemption, because such a resignation is naturally implied in the grant of redemption, as a necessary consequence thereof ; especially considering, that it hath been usual to decern so in all redemptions of wadsets, altho' they bear no such obligations ; and that (as was objected in the present case) altho' reversions by our law are *stricti juris*, yet that is only interpreted where something is craved, which is extraneous, and may extend the clause of reversion. Gosford, 25th June 1675, Duke of Lauderdale *contra* Lord and Lady Yester and Earl Tweddale. The like. Durie, 9th February 1628, Simpson *contra* Boswell.

A RELICT paying a part of her husband's debt, and desiring forbearance for the remainder, was not found thereby obliged to pay the remainder. Gilmour, 26th January 1665, Blacket *contra* Bunkle.

ASSIGNATION of a bond imports an obligation to deliver the same, tho' not expressed. Stair, Gosford, 25th June 1670, Finlay *contra* Earl of Northesk.

A RELICT being infest in a jointure of chalders of victual, the heir and his tenants were found liable to transport her victual to any ports or places, as they do to the heretor himself by tacks or custom. Fountainhall, 29th July 1680, Countess Dowager of Errol *contra* Earl of Errol.

A CREDITOR

IMPLIED POWER.

A CREDITOR having disposed a sum to his eldest son in life-rent, and to his second son and his heirs in fee, but with prohibitory clauses upon the second son not to alter; a contract is entered into betwixt the brothers, by which it is agreed, That the eldest son should have the absolute disposal of the money, and he thereupon making a gratuitous conveyance, a competition arose betwixt the assigney and a creditor of the second son's arresting in the debtor's hand, with regard to the annualrents that fell due since the eldest brother's death. It was agreed, that the contract was void as to the principal sum, because of the limitations the fiar was laid under: And upon this it was pled for the arrester, That it behoved to be null also *quoad* the annualrents, because these were not disposed in the contract. Answered, *Majori inest minus*, giving a power to dispose of the principal sum, tho' this could not be effectual, implies a power to dispose of the annualrents, which the fiar might have disposed of himself, and consequently the liferenter's conveyance, who had the fiar's powers, must stand good for every thing the fiar himself could have done. The Lords found, The conveyance made by the liferenter, by virtue of the mutual contract betwixt him and his brother the fiar, is effectual for the annualrent bygone, and in time coming, during the fiar's life. Home, 18th February 1721, Spence *contra* Elphinston.

IMPLIED WILL.

A PARTY having left a legacy to a friend in case his wife should bring forth a male child, and augmenting the sum in case it proved a female; she having brought forth no child, the Lords declared the augmented legacy effectual *ex præsumpta voluntate testatoris*. Dirleton, 18th July 1666, Wedderburn *contra* Scrimzeour.

IN the same case the Lords thereafter found, That a male child was to be understood a living child; and therefore still declared the legacy effectual, tho' the wife had been brought to bed of a still-born male child. Dirleton, 26th July 1666, Wedderburn *contra* Scrimzeour.

A TESTATOR leaving 4000 merks in legacy to build a bridge, which cost but 1000 merks; it was found, That the executor had not fulfilled the defunct's will, and that the superplus ought to be employed to other pious uses. Stair, 18th June 1678, commissioners of the shire of Berwick *contra* Craw.

IN a contract of marriage there occur'd the following clause, "And in case there should happen to be only one daughter, he obliges him to pay the sum of 18000 merks; if there be two daughters, the sum of 20000 merks, whereof 11000 to the eldest, and 9000 to the youngest; and if there be three daughters, the sum of 30000 merks, 12000 to the eldest, 10000 to the second, and 8000 to the youngest." A fourth daughter having existed of this marriage, in

a process betwixt her and the other three, the question occurred, Whether she could have any share of the 30000 merks upon the presum'd will of the father, or if she was to be left to insist for her legal provision *ab intestato*? The Lords found the fourth daughter intitled to a proportion of the 30000 merks; and found her proportion, suitable to the provision made in the contract of marriage, to be 4500 merks; so as to restrict the eldest daughter to 10500 merks, the second to 8500 merks, and the third to 6500 merks. 18th July 1729, Anderson *contra* Anderson.

IMPLIED substitution. See Succession.

IMPLIED limitation. See Fiar absolute limited.

IMPROBATION.

This action
to whom com-
petent.

AN apparent heir, not retoured, has no title to pursue an improbation of deeds derived from his predecessors. Durie, 3d December 1634, Lord Johnston *contra* Johnston. Stair, 14th July 1671, Dunbar *contra* Maxwell.

A GENERAL service is a good title in an improbation of the predecessor's deed, which will infer warrandice against the pursuer. Durie, 4th February 1630, Earl of Kinghorn *contra* Strang.

AN improbation by a purchaser of lands from one infeft, calling for production of personal bonds, granted by the author and his predecessors, was sustained with this restriction, That certification should be granted for not production, in so far as the pursuer may be prejudged by these bonds in his right to the lands libelled. Durie, 14th July 1626, Hamilton *contra* vassals of Bargeny.

A GENERAL service is a sufficient title in an improbation of an assignation, granted by the defunct predecessor, of an heretable bond, upon which no infeftment had past. Durie, 7th March 1629, Morris *contra* Johnston.

A SASINE upon a precept of *clare constat*, sustained as a title in an improbation of rights made by the pursuer's father concerning these lands, he producing *cum processu* his precept of *clare*, and instructing that his father was infeft. Durie, 1st December 1632, Panter *contra* Dick.

---The like with regard to writs granted by the king, affecting lands derived by progress from the king to the pursuer. Durie, 19th February 1630, Douglass *contra* Ld. Swinton. --- But the pursuer of an improbation has no interest to call for production of any writs granted to the defender by the king, unless he libel and qualify that his right to the controverted land is also derived from the king; and the Lords found, That the pursuer's right of property as being infeft in the lands, was no sufficient title to call in general for all writs affecting the lands which the defender had, from whomever derived. Durie, 26th March 1623, Lord Yester's heirs *contra* Earl Buccleugh.

HE who in an improbation libels himself heretable proprietor, and only produces for his title a sasine upon his own resignation, and deduces no right to the lands from his predecessors, will not get certification
against

against the defender for not production of infeftments alledged made to him of the lands libelled by the king or by the pursuer's predeceffors : For the Lords think it unreasonable, upon a recent infeftment, to force defenders to open their charter-chests, and thereby to disclose the defects of their ancient rights. Haddington, 27th February 1610, Drumlanrick *contra* Gladstones. ----- In an action of improbation against vassals, in which writs were called for, granted by the pursuer's predeceffors ; the Lords found the action could not be sustained, unless the pursuer should make out, That he was served heir by progress to every one of his predeceffors, whose deeds were called for. Durie, 1st February 1622, Ld. Craigie *contra* his vassals. Forbes, MS. 11th November 1713, Murray of Tochadam *contra* Wordie. ---- In the like case, the pursuer's infeftment as heir to his grandfather was found not sufficient to call for deeds affecting the lands granted by his father, who was not infeft, and whom he did not represent. Haddington, Hope, (*Improbation*) 20th December 1622, Lord Cathcart *contra* his vassal. --- In the like case, the action was sustained for production and improbation of all writs made by the pursuer's father, grandfather, great-grandfather, and other predeceffors to whom he might succeed *jure sanguinis* ; and the Lords found it not necessary, That the pursuer should be served heir by progress. Durie, 14th July 1626, Hamilton *contra* vassals of Bargeyny. ---- A general service to a predeceffor, who had a charter without infeftment, sustained to force production of all rights to the lands libelled, flowing from the descendants of that predeceffor. Durie, 4th February 1631, Ld. Glengerrie *contra* Lord Lovat. ---- An adjudication led against an apparent heir upon his own bond, purchased in by the apparent heir, who was infeft thereon, being made the title of an improbation, wherein all deeds were called for affecting the lands, granted by the pursuer's father, grandfather and great-grandfather ; and which title proceeding upon a special charge to enter heir to these predeceffors, was contended to be equal to a general service ; it was answered, That tho' an heir served has interest to improbate deeds, which may affect him personally, he cannot quarrel a real right by infeftment, unless he produce his predeceffor's infeftment, and his own infeftment as heir to him ; and if such a title were sustained, there would be too easy access of prying into charter-chests ; the Lords would not admit of certification till the predeceffor's infeftments should be produced, Stair, 24th July 1673, Shaw *contra* Wat. --- He who is seised upon a precept of *clare constat*, intending improbation of another man's evidents of the same lands, will not compel him to produce, unless he shew some preceeding infeftments of the lands competent to his predeceffors to whom he pretends himself heir. Haddington, 29th June 1610, Meldrum *contra* Irvines.

In an action of improbation against vassals, in which writs were called for granted by the pursuer's authors, condescended on in the summons, the Lords found it incumbent upon the pursuer to produce his authors infeftments, and also to instruct a progress from them. Durie, 1st February 1622, Ld. Craigie *contra* his vassals. ---- In an improbation of all writs affecting the lands libelled, made to the defender's predeceffors by the pursuer's father, grandfather, or other predeceffor to whom he might be heir, or by his granduncle who disposed the lands to his grandfather ; found, That the defender was not bound to produce, till the pursuer instructed that his granduncle was infeft, and had disposed to his grandfather ; but the same day was assigned

to the pursuer to prove, and to the defender to produce. Durie, 5th March 1630, Earl Wigton *contra* Earl Cassils. ---- The pursuer calling for all deeds affecting his lands, will not obtain certification, but against deeds flowing from authors with whom he connects a progress. Stair, 20th January 1665, Little *contra* Earl Nithsdale. Forbes MS. 11th November 1713, Murray *contra* Wordie. ---- A pursuer's own charter and sasine not sustained to force production of any deeds granted by his authors, till his authors rights be produced. Fountainhall, 23d June 1680, Arbuthnot *contra* Earl Marishal. ---- All rights being called for in the defender's person affecting the lands libelled, wherein the pursuer was infest as proprietor, the defender refused to take a term, except to produce rights derived from those with whom the pursuer connected a progress; and he alledged, that the pursuer could have no interest to call for rights derived from third parties, with whom he had no connection either *passive* or *active*. The pursuer answered, That he had a plain interest to have his lands disburdened of all incumbrances affecting the same, and that this interest could be no otherwise explicated than by calling for writs in general affecting the lands. Replied, That whatever interest the pursuer may have, it would be destructive to the lieges to allow of such a general conclusion in a reduction and improbation, as affording a ready way of laying open every man's charter-chest. For example, a creditor leading an adjudication may put in what lands he has a mind which never belonged to his debtor; would it be reasonable to force the proprietors to produce their rights upon such a sham title? For this reason, the Lords have ever been in use to restrict such general conclusions to the writs derived from authors and predecessors, with whom the pursuer connects. The Lords would not recede from the current practice, and therefore sustained the defence, That the pursuer had no interest to reduce any rights, but those flowing from his authors with whom he connected a progress. Fountainhall, 16th December 1709, Farquharson of Innercauld *contra* Earl Aboyne.

IN a reduction and improbation of all writs concerning the lands libelled belonging to the pursuer, alledged granted to the defenders by John last abbot of Holy-rood-house, or umquhile *A. B.* his predecessor, or by any abbot of Holy-rood-house before them, it was objected, That certification could not be granted on the general clause, but only of such writs as had proceeded from the particular abbots whose names were libelled; the Lords sustained the certification in the above general terms, in respect that the authors were churchmen. Spotiswood, (*Improbation*) 5th February 1624, Ld. Broughton *contra* the Canon-gate. ---- The like was found betwixt the bishop of Dunkeld and his vassals. Spotiswood, *ibid*.

A RETOUR found a sufficient active title, tho' without a sasine, to insist in an improbation of certain rights affecting the lands to which the pursuer was retoured, he therewith producing his predecessor's sasine. Durie, 20th March 1623, Lord Yester *contra* Earl Buccleugh. ---- A general service found a sufficient title in an improbation of rights affecting the estate, wherein the pursuer's predecessor died infest, tho' it would not be sufficient, if after production the pursuer were going on with his reasons of reduction. Gosford, 22d November 1671, Ld. Rouallan *contra* Earl Tweddale.

A DISPOSITION without *fasine* was not sustained as a title in an improbation of real rights affecting the lands derived from the pursuer's author to the defender. Durie, 1st December 1630, Ramsay *contra* Ld. Conheath. ---- Yet a purchaser infest was found intitled to call for production of all rights granted to the defender by the pursuer's author, tho' he did not instruct that his author was infest. It was objected here, That if the author was not infest, the pursuer's infestment behoved to be null, as *a non habente*. But the answer was sustained, That, as the author might insist for improbation of the writs called for, alledged granted by himself, whether he was infest or not; the same privilege was competent to the pursuer, as deriving right from him. Durie, 26th January 1628, Baron Achyle *contra* Ld. McClean.

AN apprising with a charge without infestment, sustained as a title in an improbation of all rights affecting the lands, so far as to force production of the same. Durie, 3d December 1634, Lord Johnston *contra* Johnston. Stair, 24th June 1681, Oswald *contra* Douglas. ---- The like, tho' the apprising was on the pursuer's own bond, who was apparent heir, simulate and assigned to himself. Stair, 20th January 1665, Little *contra* Earl Nithsdale. ---- In a reduction and improbation, at the instance of an adjudger, of all rights affecting the estate, it was objected, That no man can insist in this process unless he be infest, or at least have charged the superior. The Lords sustained the objection. Marcus, (*Improbation*) February 1684, Mr. Charles Home *contra* Earl of Home's vassals. ---- Arthur Forbes having died infest in the estate of Balveny, an adjudication was led for the apparent heir's behoof upon his gratuitous bond, which was made the title of a reduction and improbation, calling for all rights affecting the said estate; the Lords found the pursuer's title without infestment, sufficient to force production of all rights flowing from Arthur Forbes of Balveny, or his predecessors; but not sufficient without infestment to force production of all rights flowing from the authors of Arthur Forbes, or their predecessors, unless the pursuer should first condescend upon such authors, and give reasonable evidence that they were his authors. 24th January 1739, Kieth of Bruxie *contra* Lord Bacco.

DISCHARGES of reversions cannot be called for, unless the pursuer produce the reversions to which they relate. Haddington, 20th December 1622, Lord Cathcart *contra* his vassals.

WHEN lands are pretended to be thirled to a mill, the heretor has good interest to pursue an improbation against the heretor of the mill, of rights and writs bearing express constitution of the said servitude. Dirleton, Stair, 8th December 1675, Ld. Arniston *contra* Murray.

A BOND for the price of lands being granted by the purchaser, to a third party, payable only after the seller's purging all inhibitions used against him before the sale; the Lords found, That the said third party was intitled to pursue reduction and improbation of inhibitions obstructing his payment. Forbes, 29th January 1712, Ogilvie *contra* Earl Leven.

A PURSUER insisting for reduction and improbation of all writs belonging to the defender, relating to certain lands alledged to be part and pertinent of the pursuer's property; it was found, That he must instruct his alledgeance before the defender be obliged to take a term to produce. Stair, 20th January 1669, Hay *contra* town of Peebles.

Stair, 17th November 1675, Murray *contra* Dundas. ---- But afterwards the Lords assigned a term to the pursuer to prove part and pertinent, and the same term to the defender to produce, in case the libel were proved. Stair, 13th February 1680, Earl Mar *contra* Marquis of Huntly.

Conclusion
calling for all
writs in general.

A GENERAL conclusion in an improbation, calling for all bonds, contracts, obligations, charters, &c. granted to the defender by the pursuer, or his immediate predecessor, to whom he is served heir, was sustained without condescending particularly, since no other writs were called for but what were granted to the defenders themselves personally, of which they could not be ignorant. Durie, 4th July 1627, Leslie *contra* Leslie. ---- In an improbation, all bonds being called for granted by the pursuer in favours of the defender, or whereunto he had right by assignation; certification was sustained hereupon, tho' both general and in absence, improbation being a general remedy to secure the lieges against any right, real or personal, that may be pretended against them. Stair, Gosford, 31st January 1677, Gairden *contra* Pearson. ---- This general clause was sustained, craving production of whatever decreets obtained by any of the defenders predecessors, which might affect the lands, and establish any right thereto in any other person, albeit it neither bore the name of the party obtainer of the sentence, nor against whom, before what judge, or for what cause the decreets were. ---- Durie, 5th March 1630, Earl Wigton *contra* Earl Cassils. ---- In a reduction and improbation, the Lords refused to sustain an incident where no particular writ was called for, referring only to the summons which was general. Hope, (*Incident*) 6th December 1616, Duncanson *contra* Pitcairn. ---- In a reduction and improbation of rights affecting the pursuer's lands, found, That the persons by whom the writs called for were first granted should be condescended on in the libel, and that it was not enough to libel in general, that these were granted by some of the pursuer's predecessors to some of the defender's predecessors and authors. Marcus, (*Improbation*) November 1687, Earl of Airly *contra* Ld. Pitlurg. ---- The Lords found, That in an improbation the defender cannot be obliged to produce any writs but such as are specially called for, and that no certification can pass on the general clause of the libel in improbations, of all writs, &c. and that there was no disparity whether the king or a subject were pursuer. Fountainhall, 19th January 1698, king's advocate and his factor *contra* Marquis of Montrose. ---- In a reduction and improbation at the instance of an heritor of land, against the heritor of a mill, to which mill his lands were pretended to be astricted; the Lords refused to sustain this general conclusion, that the defender should produce all writs which might import thirlage, in respect there might be writs importing thirlage consequentially, of which the defender was not obliged to know what the import might be; and it were hard, that, upon pretence of such an interest, the defender should make his charter-chest patent to the pursuer: And the pursuer had a remedy, if he apprehended that the defender might trouble him, upon the pretence of writs which might import consequentially thirlage, viz. he might force him to produce the same, by intenting a negatory action and declarator of freedom. Dirleton, Stair, 8th December 1675, Ld. Arniston *contra* Murray.

FOUND,

FOUND, That certification in an improbation cannot be granted, unless the conclusion of the summons, before the reasons, expressly bear conclusion of improbation, altho' there be a reason of improbation contained in the said summons. Hope, (*Improbation*) 15th January 1624, Hamilton *contra* Matthison, ---- But certification was sustained upon a conclusion of improbation, without mention of any reason why the writ should be improven. Hope, (*Improbation*) 15th February 1627, Earl Kinghorn *contra* Grange.

Certification cannot be granted, unless improbation be libelled.

A DECRET of certification was found null against a party, tho' marked as compearing, because there was nothing libelled requiring him to produce his writs under certification. Stair, 23d June 1680, Earl of Queensberry *contra* Earl of Annandale.

As likewise certification of falsehood for not production.

A DECRET of certification, declaring the writs void and null, imports no more but a certification in a simple reduction, tho' improbation be libelled as well as reduction. Fountainhall, 19th January 1694, Hill *contra* Gardner. ---- It was objected against a decret of certification following upon an action of reduction and improbation, *imo*. That there is no reason of reduction contained in the decret, or so much as libelled. *2do*. The decerniture *reduces, rescinds and annuls*, &c. but wants the additional words necessary in an improbation, *viz. and improves*; the Lords found the certification to be only a certification in a common reduction, in respect it bore not the word *Improves*. 24th July 1733, Garden of Bellamore *contra* Earl of Aboyne.

The stile of a certification in an improbation.

A PARTY pursuing a transferring of an old process against another, for establishing a debt against him as heir served and retoured to one of his predecessor's; and the defender in the transference, having raised an improbation of that old process and grounds thereof, and particularly of that retour, which he quarrelled as false and feigned; the Lords found, That the defender in this improbation ought to produce the said retour, altho' he alledged, That it was the pursuer's evident, so that he was not bound to produce it nor the grounds thereof. Newbyth, 16th December 1665, Home *contra* Earl of Home.

Who must satisfy the production?

IN a reduction and improbation a third term was granted for production, albeit there was but a writ or two called for *nominatim*. Stair, 22d January 1662, Hepburn *contra* Hepburn. See act 16. parl. 1672. § 25.

What terms allowed for production?

AN exception being made against an action of improbation, That the pursuer was decerned by a decret arbitral to ratify the infestment contraverted; the exception was repelled against the production. Had-dington, 25th February 1607, Calderwood *contra* Ld. Ley.

Defender must produce, reserving his defences.

CERTIFICATION was granted against retours, altho' they may be had in the chancery, which is a publick register, because certification can be granted against any infestment if not produced, altho' it may be had in the register of the director of the chancery, much more against retours. Durie, Spotiswood, (*Improbation*) 29th February 1628, Earl of Nithsdale *contra* Ld. Westraw. ---- Certification was refused to be granted against retours or services before the year 1544 (at which time the registers were burnt by the English) *i. e.* all retours and services.

In what cases extracts sustained to satisfy production?

vices, which the defender will make faith are not in his own hands. Durie, Spotiswood, *Ibid.* --- Charters under the great seal, retours, &c. being called for, it was found not sufficient to bar certification, That the defender offered to condescend they were *in publica custodia*; because it is not incumbent on the pursuer to search the records, and to satisfy the production by producing extracts, &c. Durie, 20th March 1633, the king's majesty *contra* Earl of Strathern. ----- It is otherwise with regard to writs registred in the court of session, in which case a condescendence of the dates of registration is sufficient, because that is saying, The writs called for, are already in the hands of the clerks of court, which of course must satisfy the production. Stair, 20th January 1665, Little *contra* Earl Nithsdale. ----- In a reduction and improbation of a decreet, recovered before the court of session, the defender must produce the warrants, and it is not sufficient to say, That they are in publick custody. Fountainhall, 7th July 1702, Home of Renton *contra* Sir Patrick Home. ----- In a reduction and improbation, it is sufficient to stop certification of the writs called for, to alledge, That they are *in publica custodia*, and to condescend upon the dates of the registration; but where the defender took terms to produce, and the terms were run, the Lords refused to sustain this condescendence, but they allowed the defender ten days to search the registers, and to produce the clerk-register's attestation, that the writs were registred; in which case, the Lords would give warrant to the clerk-register to produce the principals. Stair, Fountainhall, 11th January 1681, Monro *contra* Gordon. --- A defender in an improbation, having given in a condescendence of writs *in publica custodia*, after extracting the act for the first term, before extracting an act for the second; the Lords allowed it to be received to stop certification. Forbes MS. 24th November 1713, Earl Leven *contra* Morison. -- In a question, if an extraneous donatary to an escheat on a horning and denunciation, not at his own, but another man's instance, be obliged for satisfying the production in an improbation against the principal horning, to produce the said principal, or if an extract be sufficient? for if he be creditor and donatary on his own horning, then he is bound to produce it; the Lords found this extraneous donatary not bound to produce the principal, but that the extract satisfied the production, as had been formerly often decided. Fountainhall, 20th January 1686, Baillie *contra* Dunbar and Douglass. --- The extract of an inhibition with the principal executions, found to satisfy the production in an improbation, notwithstanding the act of parl. 1581, Chap. 119, which requires the principal to be produced. Hope and Spotiswood, (*Improbation*) 21st March 1632, Lord Erskine *contra* Lady Renton. And again. Hope, (*Improbation*) Dundas *contra* Holburn. The like, with regard to an interdiction. Hope, (*Interdiction*) March 1613, Douglass *contra* Cranston. ----- In an improbation of a registred writ, the Lords found, That the defender is not obliged to produce the principal, if it was registred before intenting of the cause, but otherwise, if after. Auchinleck, (*Improbation*) 18th July 1628, Ker *contra* Scot. --- Certification was refused for not production of a principal bond, an extract having been produced, because it was registred in the registers of session, and the principal was lost by the disorder of the times. Dirleton, 16th, Stair, 20th November 1666, Blackwood *contra* Purves. --- Production of extracts out of the books of session stops certification, but not extracts of inferior courts, because the peril of the loss of a writ registred

registred in an inferior court, lies upon the creditor. This was found, in respect of a constant custom alwise observed. Stair, 14th January 1674, Thoirs *contra* Ld. of Tolquhoun. Gosford, 17th December 1668, Bayne *contra* Balfour. Gosford, 15th June 1671, Hay *contra* Jamieson. Dirleton, 30th June 1675, Dunmuir *contra* Lutfoot.---In a reduction and improbation a certification passes *contra non producta*, upon the presumption of falshood, inferred from not production: But certification being craved against a bond registred in an inferior court, it was found sufficient to take off the presumptive falshood thereof for not production, that it had been homologated by the debtor, and that it was proved to be truly book'd and registred, and lost without the creditor's fault, and diligence done thereupon in the debtor's lifetime; and therefore certification was denied against the bond, the extract whereof was produced. Stair, Dirleton, 2d January 1675, Thoirs *contra* Ld. of Tolquhoun. See Stair, 15th July 1675, Fumartoun *contra* Lutfoot. --- The Lords upon a bill found this defence relevant to stop certification in an improbation of a bond, *viz.* That the defender produced an extract of the bond out of the books of session, it being registred in those times when the principals were given back, and that the principal of the bond in question was thereafter seen and made use of at divers communings, and produced in a process before the sheriff-court of the shire. Fountainhall, 10th July 1678, Ballendalloch *contra* Dalvey.---The Lords sustained an extract to satisfy the production in an improbation, where it was proved, That the register and warrants of that year were lost; and this altho' it was an interdiction, and its executions whereof the parties get the principals back. Fountainhall, 13th February 1679, Gordon *contra* Forbes. ----- An extract of a contract of marriage registred in the publick register in *anno* 1633, sustained to satisfy the production in a reduction and improbation, tho' after search it could not be found in the register, and the warrants of these years were not lost; but marriage having followed, and so notour, the defender was not put to prove the tenor. Marcus, (*Improbation and Reduction*) February 1682. *contra* -----

In an improbation of a disposition, which was dated in the 1662, and registred thereafter, search being made (in order to satisfy the production) for the principal among the warrants in the lower parliament-house, and no vestige of it being found, either in the minute-book, register, or other record; the Lord Register also giving a declaration, that after a most diligent search it could not be found; whereupon the pursuer craving certification, and the defender, to stop it, producing the extract, dated in the 1663, under the then Lord Register's hand: The Lords having balanced the great inconveniencies and dangers on both sides, thought not fit to give a general decision on the point; only, in this special case, they granted certification, no vestige of the writ appearing, and because the defender could easily prove the tenor, there being a *safine* and divers other adminicles. Fountainhall, Dalrymple, 28th December 1704, Wilson *contra* Lord Saline. --- A creditor upon an incumbered estate, for a sum far exceeding half its value, pursuing reduction and improbation against all the other creditors; and the question being, How far they were obliged to produce warrants and principal writs, and how far extracts could satisfy the production? The Lords considering the inconveniencies on both sides,

and what had been the constant form in this case, determined as follows, *viz.* That if they be writs registred in the books of session, a condescendence on the dates of their registration is sufficient to burden the pursuer with the search, but that it is otherwise in writs registred in inferior courts; therefore the Lords, in the present case, found, That certification ought to pass against the last, if not produced; but, in regard of the importance of the affair, and greatness of the danger, they gave the defender a diligence to cite the clerks for recovery of these principals; and because they were dispersed through so many judicatories, they assigned a long day to search them out. Fountainhall, 20th June 1706, Strachan *contra* creditors of Edzel.

A condescendence that the writs called for are in a private hand, not sufficient.

CERTIFICATION in an improbation at the instance of an heir served *cum beneficio*, against some bonds of provision granted by the defunct to a wife and children of a second marriage, was refused to be stopped, upon this ground, That the writs called for were in the hands of the said defunct's writer. Forbes, 22d November 1705, Ayton of that ilk *contra* Lady Ayton.

Transumps, if sufficient to stop certification?

THE pursuer of an improbation craving certification against the writs called for, notwithstanding of a transumpt of them produced; it was alledged for the defender, That transumps proceeding upon summons and citation of parties, and not by instrument, are sufficient to satisfy the production in improbations; for many of the securities of this kingdom are but transumps, the principal writs being lodged with the party having the greatest interest: And in this case the parties were cited to hear the bond transumed, because the principals were to be sent to Virginia to pursue the debtors there; and being accordingly sent, as appears from attornies letters, they cannot be got, now that he is dead. Answered for the pursuer, That transumps, upon compearance of the parties, may indeed have the same faith with the principal writs; but here there was not only no compearance, (which makes the transumpt no better than an extract) but the debtor was out of the kingdom. Again, the stile of decreets of transumps bear, that they are to have the effect of principals, except in the case of improbation. Replied, This transumpt would be sufficient for proving the tenor, and the exception of improbation in decreets of transumpt is but exuberant stile. The Lords sustained the transumpt to stop certification. Hareus, (*Improbation and Reduction*) 20th June 1688, Thomas Laurie *contra* Mary Austin.

No certification *contra non producta*, where the defender produces and offers to exclude.

IN an improbation pursued by the bishop of St. Andrews, against a number of his vassals and subvassals, the Lords would give no certification against the subvassals, until the production of the vassals should be first discuss'd; because their satisfying the production takes away the bishop's interest against the subvassals. Haddington, 4th June 1611. --- It was sustained, That the defender had produced sufficient to exclude the pursuer, and that till his rights produced were discuss'd and taken away, there could be no certification *contra non producta*. Stair, 20th December 1662, Dunbar *contra* his vassals. --- In an improbation at the instance of a superior against feu-vassals, the Lords found, That one of them having produced a more eminent progress, which he alledged would

would exclude the pursuer, no certification could be granted *contra non producta*, the defender not being obliged to show any other writs until these which were produced should be discuss'd. Dirleton, 5th December 1667, Earl Lauderdale *contra* vassals of Musselburgh. --- In the same cause, the Lords found, That the defenders were not obliged to declare, that they would use no other writs than those which were produced; which, nevertheless, might put the pursuer to a new process of improbation. Dirleton, *ibid.* --- In a reduction and improbation of land-rights, 'tis a good defence, That the defender has a preferable title to the subject exclusive of the pursuer's right; consequently that the pursuer has no *interest* to insist in the process, and the defender will be allowed a term to prove his defence in the ordinary way: But after a term is taken to produce, and an act extracted, which is virtually an acknowledgment of the pursuer's title, an offer to exclude, or to shew that the pursuer has no interest by production of a preferable right, ought not regularly to be received, being competent and omitted; yet even in this case, an offer to exclude will be admitted of, provided it be instantly instructed: For this reason, after a term is taken to produce, the defender offering to exclude the pursuer by production of a habile title, and offering to prove a forty years possession, the Lords will not admit of the proof in this state of the process, but will reserve the same until discussing of the reasons of reduction. 18th January 1740, Lamont *contra* Lamont. --- Forbes, 25th January, Fountainhall, 3d February 1709, Farquharson *contra* Fraser. 29th January 1735, Ainslie *contra* Watson. Stair, Gosfords, 19th January 1672, Earl Queensberry *contra* M'Gauchin. --- In a reduction and improbation, the terms being run, writs produced, and certification craved *contra non producta*, the defender alledged no certification, having produced sufficiently to exclude the pursuer's title; which the Lords sustained, the defender proponing the same *peremptorie*; so that if the pursuer should improve these writs, there could be no further terms for the defender to produce other writs. Stair, 23d January 1673, Bannantine *contra* Rome. --- Found, That the defender's father's infestment being anterior to the pursuer's infestment, did exclude certification, tho' the defender did not instruct himself heir to his father; it being the common stile of reductions and improbations, to call for production of all rights made to the defender and his predecessors, to whom he may succeed *jure sanguinis*. Stair, 13th July 1680, Ld. of Strowan *contra* Marquis of Athole. --- After the defender has made a production sufficient to exclude the pursuer's, the pursuer is at liberty to produce older titles *cum processu*, upon which he may crave certification, unless again excluded by a new production. Durie, Haddington, 26th February 1622, Earl of Kinghorn *contra* Ld. Inchstuir. --- If the defender produce preferable rights, and offer to exclude the pursuer, this will stop certification, or taking of a term to produce; but if he fail in this, and the pursuer be found preferable, he will not be allowed a second offer to exclude upon a further production, but he must either take a term, or allow certification to pass. Fountainhall, 7th February 1696, Bain of Tulloch *contra* Gordon of Gordonston. Stair, 7th December 1667, Earl of Lauderdale *contra* Major Biggar.

Certification refused where the pursuer his predecessors or authors have acknowledged the writs called for.

IN general improbations, the Lords found, That no certification can be granted against any writs anterior to confirmations, original infeftments, or precepts of *clare constat*, granted by the pursuer himself, or his predecessors to whom he may succeed *jure sanguinis*, or yet granted by any of his authors, to whom he is singular successor, for in this case, the Lords put no difference betwixt a singular successor and heir of blood. Spotiswood, (*Improbation*) 13th June 1627, Hamilton *contra* tenants of Bargeny. --- In an improbation against vassals, the Lords refused certification against any writs not produced, the vassals always showing three sines and three precepts from the superior and his predecessors, together with the original charter, unless the superior would offer to improve some of the precepts produced. As also they found, That the sine on the original charter could not be decerned to make no faith for not production, nor even in case the same were produced could the superior be heard to improve it; because, by giving the precept of *clare constat*, he had admitted, that the vassal was infeft and seised in the lands. Hope, (*Improbation*)

February 1610, Lord Sanquhair *contra* his vassals. --- The heirs of the granter of a bond, having in his lifetime ratified the same; the Lords found, That they could not thereafter improve it in respect of their ratification, unless they would improve the ratification first. Spotiswood, (*Improbation*) 24th March 1635, Lady Benholm *contra* the Laird's heirs. --- Certification against a principal right was refused, in respect the defender was desired by a letter from the pursuer to purchase the same. Forbes, 28th January 1708, Glendinning *contra* Irvine. --- Certification was granted against a procuratory of resignation, at the instance of the granter's heir, tho' the granter had acknowledged and homologated the same in after-deeds; because this only proves the existence of the procuratory, but not the contents; and there might have been limitations or other clauses in favours of the granter and his heirs, which they were entitled to see; and the only method known in our law to force production, is, a certification of being held as false and forged if not produced. It was pled for the defender, That a decret of certification is founded upon a presumption of falshood arising from their refusing to produce; and that, in this case, the presumption was sufficiently taken off by the acts of homologation. It was pled for the pursuer, That certification is not built upon any presumption of forgery, the contrary of which is frequently acknowledged in the pursuer's own libel, being inconsistent with several other reasons of reduction commonly libelled; that our law appoints writs to be produced to every one who can show he has an interest in the production; and it appoints the production to be under the penalty or certification of being held as false or feigned; this is not discerning them false or feigned, but only that they shall be of no faith in judgment, more than if they were false or feigned. 23d July 1735, Marquis of Annandale *contra* Lord Hope.

If the defender may produce to stop certification in the improbation, allowing the reduction to go in absence.

A DEFENDER, in a reduction, containing improbation, producing the writs called for, and declaring, That he produced the same for satisfying the action so far as concerned improbation; but that he would be absent as to the reduction, and was content that certification in absence should be granted thereupon, which he contended he might do, they being actions of distinct natures; the Lords found,

That

That either he should compear and satisfy the production in the whole cause, or else that he should be absent *in totum*; and refused to suffer him to divide his compearance and production. Durie, 29th June 1626, Lord Kildrinnie *contra* . ---- The like, Haddington, 21st June 1605, Wardlaw *contra* Curriehill.

THERE being a contest for precedency among noblemen, the Lords found, That none of them could pursue an improbation of the other's titles, and therefore ordained the pursuer to insist in his declarator of precedency, as being the only way allowed by parliament; because it was not to be imagined, that any nobleman, by keeping up of his writs, would suffer his precedency to be taken from him by a decret of declarator, and that it might be of dangerous consequence to force them to produce all their ancient infeftments of lands, which might bear the erection and title of honour and dignity, wherein the pursuer could pretend no interest, seeing thereby the rights of their lands and inheritances might be drawn in question. Gosford, 16th January 1672, Earl of Sutherland *contra* Earl of Errol.

Improbation
not sustained
against titles
of honour.

FOUND, That in improbations pursued by liferenters the certification must be restricted to the pursuer's interest, *i. e.* altho' the writs called for be decerned to make no faith in that process, it is only meant in so far as may prejudice the liferenter, but will not be at all beneficial to the heretor. Durie, Spotiswood, (*Improbation*) 13th February 1627, Lady Borthwick *contra* Hay.

Certification
has no effect
further than to
support the
pursuer's in-
terest.

THE Lords found a decret of certification irreducible, altho' pronounced for not compearance, and now craved to be reduced within no more than half a year after it was pronounced, and no adminicle of improbation was taken out of the way in the mean time. Hope, (*Improbation*) ult. January 1622, Auchintire *contra* Bruce. ---- Papers being called for in an improbation, and certification granted against them for not production, they were nevertheless three or four years thereafter received, because the certification was neither booked nor extracted, & *sic res erat adhuc integra*. Spotiswood, (*Improbation*) 15th January 1629, Earl Galloway *contra* Ld. Rollwood. ---- The Lords refused to repon a party against a certification in an improbation, altho' the certification was granted in winter, when the defender, being an aged woman, and attending one of her children that was distracted, could not come in the time of a storm, and within five or six days after the certification was granted she came and produced the writ; besides, that she was *vestita viro*, and therefore had neither *velle* nor *nolle*: Yet here their Lordships found out an expedient (tho' they reduced the writ upon certification) wherein both parties acquiesced. Dirleton, 14th June 1667, Forbes *contra* Blair. ---- The like observed by this same author. 28th January 1675, Hay *contra* Jamieson and Alexander. ---- A party reponed against a decret of certification. Stair, 26th June 1673, Murray *contra* Murray. ---- A defender was reponed against a decret of certification, his advocate being upon death-bed at the time of pronouncing thereof. Stair, 17th February 1675, Bannantine *contra* creditors of Rome. ---- A party reponed against certification *de recenti*, having been out of the country when pronounced. Stair, 15th November 1678, Edmonston *contra*

Grounds for
reponing a-
gainst a de-
cret of certi-
fication.

Edmonston. ---- Certification being obtained in a reduction and improbation of a bond, and the creditor offering to prove by the debtor's oath that he truly granted that bond, and so could not obtrude its falsehood; the Lords sustained the alledgeance, if he refused to depone upon the truth of the bond, because *præsumptio & fictio cedere debent veritati*. Fountainhall, 24th December 1695, M'Kenzie *contra* Boyd.

---- An apprising having been produced by the defender in a reduction and improbation, certification was pronounced against the bond which was the ground of the apprising; but was stop'd from time to time upon new applications, for the space of a year, and at last was extracted, 17th February 1698. The bond was found registred in the books of session, and the extract thereof was offered upon the 23d of the same month, with a bill, craving to be reponed against the certification. The Lords found, That the certification being fairly and regularly extracted, could not be recalled, tho' the writs were recently offered to be produced. Dalrymple, 5th January 1699, Glendining *contra* Gordon of Kirkconel. ---- In an improbation the defender's writs not being produced, through the neglect of his agent, and the hurry of business in the end of a session, and therefore certification being pronounced 22d July, and extracted the 8th August, and he applying by a summary bill at the down-sitting of the winter session; the Lords, after long debating among themselves, by a scrimp plurality reponed him against the certification, he paying the pursuer every farthing of the expence he should give up upon oath, and what further he had put him to by answering this bill, and debating *instante in causa*, without putting him to any more delay. Fountainhall, Forbes, 4th November 1709, Murray *contra* Wood.

Summar in-
carceration
upon suspicion
of forgery.

IN a reduction and improbation there appearing some grounds of suspicion against the writs produced; upon application of the pursuer, the producer was ordained to be kept close prisoner in the tolbooth until the event of the proof. Stair, 26th July 1661, Ld. Lamerton *contra* Earl of Leven.

Abiding by.

ALTHO' in improbations the user of writs, questioned as false, ought to compare, and abide by the same, a commission was granted to take the defender's declaration, that he did abide by, in regard he was a very old man. Dirleton, 14th December 1676, *contra*

. ---- An arrestment being executed against ten persons, and all the executions put in one paper, and the arrester, in a competition, being preferred as to the sums in the hands of one of them not having insisted against the rest; another creditor offering to improve the execution, and the user offering to abide by that part thereof that concerned him to whose debt he was preferred, and the other craving, that he should abide by the whole execution, because (like a retour) if any part were improven, the whole must fall; the Lords nevertheless found him not liable to abide by the execution any further than he had made use of it, which was only against one person, without prejudice of the other party's forcing him to abide by its verity *simpliciter*, when he should insist against the rest contained in that execution. Fountainhall, 10th December 1703, Rae *contra* Weir. ---- The Lords refused to allow the defender in an improbation, to abide by the writ quarrelled, with this quality, "As a true writ and deed, except as to the
" writer's

" writer's designation. " Forbes, 1st February 1706, Maxwell *contra* Irvine. In a competition for mails and duties betwixt two adjudgers, the one having offered to improve a discharge, bearing to be granted by him to the common debtor, produced by the other adjudger for proving that his competitor had adjudged for a debt that was satisfied, and the producer of the discharge having suffered the term to be circumduced against him for not abiding by it; the Lords admitted the common debtor for his interest in the process, and allowed him to abide by the verity of the said discharge. Forbes, 25th June 1708, Coupland *contra* Carruthers. --- In a reduction and improbation of a disposition granted by a husband to his wife, the wife offering to abide by the same *qualificate*, That *she truly received this disposition as it now stands from her husband*; the Lords refused to admit the quality; for tho' qualities are allowed to be adjected by heirs or singular successors, never by persons who immediately receive the writs questioned, which would encourage forgery. Stair, Dirleton, Gosford, 16th June 1675, Lady Logie *contra* Meldrum. ---- In an improbation, the party offering to abide *qualificate*, that the bonds were truly delivered to him, and offering also to depone, That he knew nothing of the forgery; this was refused by the Lords. Fountainhall, 6th July 1680, representatives of of the Bishop of Galloway *contra* Johnston. ----- At the same time the Lords ordained a tutor to abide by a discharge produced *simpliciter*. Fountainhall, *eodem die*, Aitcheson and Harvie *contra* Dr. Keith's children. ----- Offering to abide by a writ with this quality, That he found it among his father's papers, the Lords, *pro hac vice*, allowed this, he proving the said quality, wherein if he failed, they declared they would punish him as a forger, at least as an accessory; but with regard of the difficulty of the probation, they declared they would consider that at advising. Fountainhall, 3d January 1679, Grant *contra* Grant. --- A defender craving to abide by a bond *qualificate*, *viz.* That it being granted to his father, he received it from his tutors and curators; this was not allowed him, but after the bond was improven and found to be forged, the Lords allowed him to clear himself, and to instruct that he got the writ from his tutors and curators. Stair, 14th July 1680, Gray *contra* Robertson. ---- A disposition granted to a woman's father, being quarrelled in an improbation, and she craving not to be bound to abide by it simply, because granted before she was born, and made use of by her father in his lifetime, and not then quarellled as false; yet the Lords decerned the party to abide simply. Fountainhall, 24th January 1700, Fleeming *contra* Nisbet. ---- The user of a messenger's execution offered to be improved as false, was by the Lords ordained to abide by the same *sub periculo falsi*, and was not suffered to abide by it with this quality, That he found it lying in a process among his father's writs, altho' he was an infant at the date of the execution, and the person who now quarrelled it, tho' comparing in the process where it was produced, never objected against it in the father's lifetime: But the Lords allowed him to protest at his abiding by, upon any quality he thought fit. Forbes, 30th July 1713, Blair *contra* M'Dowal. ----- An heretor offering to abide by a discharge of stipend by the minister, with this quality, *viz.* That the payment being made by the tenant, who took the discharge in the master's name, he did abide by it as a writ truly delivered by the tenant; the Lords refused to sustain the quality, unless the heretor would produce the tenant

to abide by the same as truly subscribed and unvitiated. Dirleton, 3d July 1675, *contra* .---- A defender offering to abide by his executions *qualificate*, as having so received them from the messenger and nottary, the Lords ordained the defender to abide by the writ as true, and suffered him to add protestation as to his being free of any forgery, and that he received the writs from the nottary and messenger as true; and that he might instruct his protestation by producing the nottary or messenger to own the writs as true and signed by them; or by such other evidences as he thought fit. Stair, 24th December 1679, Comblin *contra* Corbie. ---- The execution of a summons being challenged as forged, and the user offering to abide by it *qualificate*, that he truly received it so from the messenger; the Lords ordained him to abide by it simply, but allowed him to protest, that he should be no further liable than so far as his accession should be proved, and declared, That at advising they would consider how far his protestation would liberate him of the hazard of falsehood as an user. Fountainhall, 27th January 1697, Stewart *contra* Ld. of Lamont. ---- Defenders in an action having proponed improbation of the execution of the summons, and consigned L. 40, the Lords found the pursuer not obliged to abide by the execution *sub periculo falsi*, in respect the messenger at the bar abode by his own execution. Forbes, 21st November 1712, M'Kenzie *contra* inhabitants of Burntisland. ---- A bond of attestation of a cautioner in a suspension, being offered to be improved as false, the Lords found, That the user could only be bound to abide by it *qualificate*, viz. That it was truly so delivered to him by the clerk of the bills and his servants. Fountainhall, 12th December 1683, *contra* Home, March 1684, Nicol *contra* Newlands. ---- A party, user of a writ, challenged in a reduction and improbation, but which writ was not produced by himself, was admitted to abide thereby *qualificate*, viz. That he made use of it as believing it a true deed, and that he was not accessory to any falsehood or forgery thereof. Stair, 24th July 1661, Ld. Lammerton *contra* Earl of Leven. ---- In a charge at the assignies instance upon a bond, the debtor suspended and raised improbation, insisting, That the assigney might abide by the bond; the assigney declared, That he would abide by it as being delivered to him as a true deed, without any knowledge of his to the contrary, and offered to produce the cedent; the Lords found the assigney was obliged no further than what was offered, and it being alledged, That the cedent was a bankrupt and had a *bonorum*, they found, That he should enact himself to compare judicially, whensoever any part of the improbation should be referred to his oath, which confest might infer the falsehood of the writ; and if in that case he appeared not, that the bond should be improved, not only to him, but to the assigney, inferring no hazard to the assigney as to the criminal part if not accessory. Stair, Dirleton, 3d January 1666, Graham *contra* Brian. ---- An exception of improbation being propounded against a writ, and thereafter the pursuer being desired to abide by it, and he declaring, That he had gotten it as a true evident, and condescended upon the way he had gotten it; but it being alledged, that he ought to be positive, whether he would abide by it or not; the Lords declared, That after probation they would consider how far his using and abiding by the writ should affect him, and whether he was *in bona fide* to use the same. Dirleton, 21st January 1668, Home *contra* Telfer. The like. Durie,

rie, 5th February 1635, *Ker contra Forsyth*.--- The defender in an improbation of an assignation transferred in his favours, having offered to abide by the same, as given to him for an onerous cause, and as a true deed for any thing he knew; the Lords ordained his immediat cedent to abide by the same simply, and suffered him to abide by the same with the foresaid quality, but reserved to themselves at the advising of the cause to consider what the said qualification might import in behalf of the user. Dirleton, 22d November 1676, *Paterfon contra M'Kenzie*. --- The defender was allowed to adject this quality, to his abiding by the truth of the bond challenged as false, that he received it blank in the creditor's name for onerous causes, but saw it not subscribed; but the Lords declared, That at advising the articles of falsehood, they would consider if the quality was pertinent to assilzie him *a pœna falsi in totum* or *pro parte*. Fountainhall, 12th November 1692, *Young contra Hays*. --- A debtor in an English double bond, offering, when pursued thereupon by the Englishman's factor here, to improve the same as false, and the factor having only offered to abide by it, in these terms, that it was truly delivered to him; the Lords found the factor either obliged to abide by it simply, seeing he made use of it, or else to produce his constituent to abide by it; and because English bonds do not design witnesses as ours do, they ordained the factor to condescend on the witnesses designation, and till this were done, they refused to burden the improver to consign, Fountainhall, 8th November 1683, *Caldwal contra Blair*. The like. Dirleton, Gosford, 30th June 1675, *Stewart contra Riddoch*.---The Lords refused to remit a man to the justice court as art and part, who had been the user of a false writ, tho' in an improbation he had subscribed to abide by it, he not being accessory to the forgery. Falconer, 14th February 1683, *Murray contra Murray*. --- Where a party refuses to abide by a writ quarrelled, the Lords found, That all that can be done, is to declare it false by a presumptive falsehood for his not abiding by it; but where the user has once abiden by it judicially, he ought not to be allowed to refile and adject qualities thereto. Fountainhall, 15th November 1695, *Young contra Hays*. --- A bond being taken to be improven, and the register having produced the principal, and the defender being absent, the bond upon the second summons of continuation, without further proceeding in the cause, was decerned to make no faith, and instantly ordained to be cancelled; neither did the Lords find any necessity, since the party did not compear to abide by the same, that the pursuer should be urged to proceed further to the trial of the falsehood; nor found it necessary to summon the defender to declare upon oath, if he had just cause to use the bond, and that he would abide by the same as a true evident. Durie, 21st June 1625, *Ld. Murdiston contra Baillie*. --- In an improbation, the production being satisfied and the writs produced, the term was circumduced against the defender for not compearing to abide by the same; upon which, without further proof of the forgery, the Lords found, That decret ought to follow upon the implied certification in the act for abiding by, that the writs should make no faith, in the same manner as in a certification for not production. Stair, Dirleton, 20th June 1672, *Henderson contra Henderson*. --- The Lords, in a like case, decerned again in the same manner; and further, left it in the pursuer's option, either to take out certification against the bond for not abiding by the same, or to insist in the improbation of it;

or, lastly, to insist in the declarator of its nullity, as wanting witnesses, in respect the instrumentary witnesses were far under age at the time of the subscribing, and declared they could not be positive whether they had been witnesses or not. Dirleton, 10th June 1675, Grant *contra* Grant.

Pursuer must
consign L. 40. as well as other parties. Colvil, December 1581, *contra*

. --- Upon the abiding of a defender by a paper produced in an improbation, the pursuer being ordained to consign in common form, the Lords, upon his representing, that he was in the poors roll, and could not afford the money, ordained him to enact himself to suffer three months imprisonment, in case the paper should be found a true deed, that so, *qui non habet in ære, luat in pelle*. Fountainhall, 29th July 1697, Johnston *contra* Johnston.

After suc-
cumbing in the
direct manner
of improba-
tion, if the in-
direct is com-
petent?

WHERE witnesses insert (or at least two of them) abide by the verity of a writ offered to be improven, the indirect manner of improbation was found thereafter not allowable. Covil, February 1587, Shin *contra* Hay. --- The same. Colvil, June 1588, Lady Polton *contra* . --- Evidents taken to be improven, being approved by the direct manner, the Lords found, That the indirect cannot be thereafter received. Haddington, 10th February 1592, Brocket *contra* Brocket. --- In an improbation of an inhibition of the messenger and two witnesses, there were two alive, who being examined approved the executions; notwithstanding whereof, the Lords allowed the indirect articles of improbation to be repeted. Durie, 7th July 1632, Ld. Renton *contra* Ld. Wedderburn. --- In an improbation, the Lords found, That an absolviture pronounced as to the direct manner of improbation, hinders not to improve by the indirect. Gosford, 7th January 1674, M'Math *contra* Oliphant.

CERTIFICATION if it can operate against any not called. See Res inter alios.

EXCEPTIO falsi est omnium ultima. See *Process*.

CERTIFICATION against grounds and warrants. See *Grounds and Warrants*.

CONCURRENCE of his majesty's advocate requisite. See *King's advocate*.

INDEFINITE INTROMISSION.

Applicable
in *durioyem* for-
tem.

AN annual renter having purchased in a first comprising, and a second compriser pursuing for the Lands; found, That the annual renter, by purchasing the comprising, had confounded the property with

with the annualrent, and that his intromission ought to be ascribed to the apprising, being the sovereign right, and not towards payment of the annualrent, tho' the same was prior to both comprisings, and that his whole intromissions did not pay his bygone annualrents; and the first comprising being extinct by intromission, the second compriser was preferred to the lands, reserving to the annualrenter to point the ground, or comprise, for his bygone annualrents. Durie, 27th February 1630, Scarlet *contra* Paterson. ---- A creditor having in his person two comprisings of the same subject, the one carrying only the reversion of the first; the question being, Whether the whole mails and duties must be imputed to the first apprising, so as to extinguish it within the legal, or proportionally to both, whereby both would be kept up? it was argued for the appriser, That indefinite payment is first applicable to the annualrents, before it can be imputed to the stock. It was pled on the other hand, That *in dubio solutio est imputanda in durio rem sortem*; and if imputation be made to both apprisings, the first apprising will not be satisfied within the legal, and the debtor's right will be taken away, which is most unfavourable. 2do, The second apprising was no title for possession, carrying only the right of reversion of the first. The possession was found only to be attributed to the first apprising, and not to the second, until the first should be satisfied. Stair, Gosford, 14th January 1669, M'kenzie *contra* Ross. Stair, 10th February 1674, Blyth *contra* creditors of Dairfay. ---- A grandfather's debt being secured by comprising, and stated against the grandchild, the intermediate mails which were *in bonis* of the father, were ascribed towards payment of the comprising, as being *durior fors*, and not in payment of the father's debt. Falconer, 22d November 1683, M'Brair *contra* Crichton. ---- In a competition betwixt real prior creditors of a defunct, and a second husband of a relict liferentrix of houses, who was in possession, and also had adjudged for expences of reparations allowed him by the dean of guild's decreet; the Lords found, That his intromissions were imputable, in the first place, in satisfaction of the said decreet, and adjudication following thereupon. Bruce, 19th November 1714, Shearers *contra* Fleming.

A POSSESSOR, whose title was reduced at the instance of one having a more preferable right, having after the reduction purchased in the preferable right, which was an apprising and inhibition thereupon, was presumed to have ascribed his following possession to his new right, so as to extinguish the apprising by intromission within the legal. Stair, 24th January 1668, Lady Wolmet *contra* Biggar. ---- An appriser having purchased in a more preferable right, and having continued many years in possession, the question occurred, If he was obliged to impute his possession to the apprising, as *duriori sorti*, to make it fall within the legal? it was found, That the intromission might be imputed to the more preferable right, in order to preserve the apprising. Stair, 8th June 1670, Hay *contra* Jamieson. ---- An apprising being led upon several sums, some of which were before inhibition, the appriser possessing, his intromissions were found imputable to each of these sums proportionally. Stair, 10th February 1674, Blyth *contra* creditors of Dairfay.

Ubi est parata executio.

ONE entering into possession having two rights in his person, the possession was found ascribable to that right which had *parata executio* in the first place, without prejudice to the possessor to maintain his possession by the other right, the first being extinguished by intromission. Stair, 8th June 1670, Hay *contra* Jamieson.

Res nobilior.

ONE having at his entring to the possession of tiends two expired apprisings of them, and a disposition thereof in security of a sum; and the said apprisings having been afterwards opened and turned to securities, the Lords allowed him to ascribe his intromissions wholly to the apprisings *medio tempore*, till the same were opened, thereby to defend himself from accounting for his intromissions in that interval. Forbes, 2d February 1711, Guthrie and Williamson *contra* Gordon.

Applicable in sortem ejusdem generis.

MY Lady Strathnaver having obtained a decret of constitution against her son, the present Lord Strathnaver, upon several articles. 1^{mo}, The bygones of her life rent annuity. 2^{do}, For 4000 merks as the liquidate sum in her contract of marriage, in place of her terce of moveables. 3^{tio}, For her childrens aliment, funeral expences, &c. Upon this decret she recovered a moveable subject to the value of L. 800 sterling, belonging to the deceased Lord Strathnaver. Thereafter, in a pursuit at the lady's instance, for recovery of her bygone annuities, the question occurred, Whether the foresaid L. 800 must be imputed into the bygone annuities as *durius fors*, or into the other articles of the decret? It was argued for the lady, 1^{mo}, That application in *duriorem sortem*, as a rule that in many cases contradicts equity, has never universally obtained with us. 2^{do}, The said L. 800, being a moveable subject, falls naturally in the first place to be applied to extinguish the moveable articles; which was found relevant. 29th November 1728, Lady Dowager of Strathnaver *contra* captain Ross of Daan.

INDEFINITE PAYMENT.

Electio est debitoris.

FOUND, That a man obliged for divers debts, making payment indefinitely, may ascribe the same to which debt he pleases. Haddington, 14th December 1592, Harvie *contra* Earl of Murray. — In indefinite payment, the brocard, *Electio est debitoris*, holds not when the debtor is bankrupt, who cannot apply indefinite payments arbitrarily in favours of one creditor to the prejudice of the rest. Stair, 13th February 1680, M'Reith *contra* Campbell. — A bankrupt cannot apply an indefinite payment to a debt in which he stands singly bound without cautioners, in defraud of his cautioners in a separate obligation; but the application must be made proportionally to both debts. Home, February 1725, Dutchess of Buccleugh *contra* Doull.

Antiquius debitorum.

INDEFINITE payment in case of divers obligations, was interpreted applicable to the eldest in date, notwithstanding the law *ex pluribus*, 89 §. 2 ff. de solut. which the Lords found never to have been received

received in Scotland. Maitland, 6th January 1565, a Frenchman *contra* Fleeming.

THE debtor in 1000 merks bond, having after the term of payment paid 700 merks, without any application to the bond, or to the price of wine resting also by him; and thereafter having received more wine, and applied the payment wholly to the wine and not to the bond: And the cautioner in the bond being pursued, he alledged, upon the payment of the 700 merks, which behoved to be applied to extinguish the bond *pro tanto*, as the *durior fors*; especially considering, That merchants allow year and day for the payment of wines. Answered, It was in the debtor's power to apply the payment. The Lords found, That the debtor might, *ex post facto*, apply so much of the 700 merks as effeired to the price of the wines furnished before the payment, unless the term of payment of the wines price was not come when the money was paid; but that he could not apply it to wine furnished after the said payment, in prejudice of the cautioner in the bond. *Harcus, (Cautioners)* November 1687, Smith *contra* James Oswald. ----- An indefinite payment was ascribed to a sum not bearing interest in the first place, and the remainder applied to a separate sum bearing interest. Fountainhall, 17th January 1693, Sir John Hall of Dunblaw *contra* bailie Alexander Brand. The like. Home, 28th June 1717, Duck *contra* Maxwell.

A TUTORIX having obliged herself personally by a bond of coroboration bearing annualrent, for a sum of bygone annualrents in an heretable bond upon her pupil's estate, on getting a backbond at the same time from the creditor, suspending personal execution against herself for seven years, provided the current annualrents of all sums, due to the creditor by them, were punctually paid, but reserving diligence against the pupil and his estate; and she being charged upon the bond of coroboration, after she had made several partial payments indefinitely, the Lords found these partial payments applyable to the sums charged for, and not to be imputed in satisfaction of the annualrents of the heretable bond, which the payer was only liable for *tutorio nomine*. Forbes, 13th July 1705, Lady Sempil *contra* Lady Comistoun.

INDEMNITY.

AN act of indemnity was found to liberate one from a spuilzie, who had taken up some horses for the service of his majesty. Stair, 15th January 1663, Greenlaw *contra*

QUEEN Anne having, upon her accession to the crown, published, as is usual, her general indemnity; the Lords sustained it to affoizie from fines imposed by the heretable bailie of a bailliary, altho' such perquisites were his property and private right. Fountainhall, 26th January 1704, Blair *contra* inhabitants of Kilmarnock.

FOUND, That acts of usury were comprehended under the sovereign's subsequent indemnity. Forbes, 27th June 1706, M'Micken *contra* Kennedy. Forbes, 26th January 1709, Colvil *contra* Irvine.

A DEFENCE founded on queen Anne's indemnity in March 1703, which pardons and remits all breaches or abuses of, or malversations in publick trust; with all other crimes, delinquencies or transgressions of omission or commission, in so far as the same may infer any pain or punishment in the lives, fortunes or reputations of her Scots subjects; was sustained to exculpate the conservator of the Scots privileges in the United Provinces, from any malversations in his office of conservator, preceeding the date of the indemnity; altho' he was called in question for the same before the said indemnity. Forbes, Fountainhall, 19th November 1707, Cumming *contra* Kennedy.

IN a subsidiary action against magistrates for suffering a prisoner to escape, the Lords repelled the defence, That the delict was pardoned by a general indemnity from the crown, published since the escape. Fountainhall, 26th July 1710, Hafwel *contra* town of Jedburgh.

ONE party's invading another during the dependence of a process, which, in the act 219, parl. 1594, infers loss of the plea; was found not pardoned by the act of indemnity. Forbes, 22d February 1712, Robertson *contra* Robertson.

A PARTY committing fornication since the indemnity, was found subjected to the double penalty of a repeted transgression, upon the account of fornication committed by him before the indemnity. Forbes, 19th November 1712, Agnew *contra* Campbell.

FOUND, That a fraudulent bankrupt was exempted, by a general indemnity, from the penalty of the act of parliament 1696. Forbes, 1st July 1713, Stewart *contra* Haliburton.

A PROFESSOR of divinity having quitted his office, in obedience to a sentence of the commission of parliament, for visiting universities, &c. 25th January 1697, depriving him for refusing to qualify himself, by taking the oaths to the government, and subscribing the Confession of faith; and the post being legally supplied by another professor, admitted thereto after the year 1703, the Lords refused to repon him upon the act of indemnity in that year. Forbes, 21st July 1713, Dr. Garden *contra* Anderson.

THE magistrates of Edinburgh, during the rebellion 1715, having caused pull down a house in the suburbs, for better securing the town against enemies attacks; in an action at the proprietor's instance against the town for reparation, the Lords found the said action was sopped by the act of indemnity, *anno primo Georgii*; tho' it was argued, that the act of indemnity was only calculated for crimes and offences; not at all to bar civil reparation, arising from a fact justifiable in itself, and done for the behoof of the publick. 29th July 1729, Jackson *contra* magistrates of Edinburgh.

INDIVISIBLE.

Decreet-ar-
bitral *ultra vi-*
vis.

A DECREET-ARBITRAL being *ultra vires compromissi*, cannot be registred, even with respect to that part of it which is within the submission. Colvil, November 1582, Lockheart *contra* Lady Polmais. — The like, Haddington, 18th February 1594, Lidderdale

Lidderdale *contra* M'Clellan. ---- The like, Hope, (*Arbitration*) 25th July 1616, *contra* . ---- A decret-arbitral being sought to be reduced *in totum*, upon this head, That it was *ultra vires compromissi*, in so far as, among other things, the arbiters had decreed the parties to grant mutual general discharges, whereas they had only submitted some particular claims; the Lords found the decret binding and obligatory *quoad* all that was submitted, and only null as to the general discharges; which they rectified by this interpretation, that they should extend no further than what was contained in the claims given in; so that here *utile per inutile non vitiatur*. Fountainhall, 25th December 1702, Crawford *contra* Hamilton and others.

SOME special matters being submitted by parties, and a general clause subjoined touching all other questions betwixt them; and the judges having remitted one point, not specially submitted, to the determination of other two persons; the Lords found, That this clause in the decret did not render the whole null; because, that altho' by the common law, if an article specified in the submission be not determined, but remitted to others, the whole decret is null; yet where a point is not specially submitted, but mentioned in a clause of the decret, the said law was found not to militate against it. Durie, 20th March 1630, Stark *contra* Thumb. ---- Contending parties having submitted all their differences, and one *per expressum*, and these arbiters having determined the special difference, and referred another particular to the determination of a third party; the Lords sustained the decret, in respect that the party whose claim was referred, judicially passed from the same. Fountainhall, 23d, Forbes, 26th February 1709, Laird and Lady Invernytie *contra* Mercer.

Decret-arbitral where points are referred to the determination of others.

A BOND being subscribed only by one notary, and the party offering to restrict his sum, the Lords found the bond not divisible. Hope, (*Obligation*) 29th November 1616, Gibson *contra* executors of Edgar. ---- The like, Durie, 13th November 1623, Marishal *contra* Marishal. ---- A bond being only subscribed by one notary was sustained, the pursuer restricting his claim to L. 100, and the Lords resolved to make this a rule in all time coming. Auchinleck, (*Notary-publick*) 22d January 1630, Morton *contra* Eliot. Durie, 2d December 1628, Robertson *contra* Jamieson. Durie, 19th December 1629, Eliot *contra* Morton. ---- The Lords sustained a discharge for a considerable sum, tho' signed for the party but by one notary, the user offering to restrict to L. 100. Durie, 15th March 1634, Brown *contra* Thomson. ---- The discharge of a legacy being signed by two notaries, and only three witnesses; the Lords found it null for want of the fourth witness; but sustained it as sufficient to discharge L. 100 Scots. Fountainhall, 4th February 1699, Donaldson *contra* Simson and Donaldson. ---- One of the witnesses to two notaries subscription for a party that could not write, having adjected to his subscription these words, (*Witness to the co-notaries subscription*) the Lords found the writ null, except as to L. 100 Scots. Fountainhall, 25th February 1710, Anderson *contra* Cock. ---- An assignation to a bond on which adjudication followed, being quarrelled by another adjudger, that it was signed for the party only by two notaries and three witnesses, and the party offering to restrict to L. 100, with the annualrents thereof, tho' it was

Writ of importance subscribed but by one notary.

alleged, that assignations are not divisible as bonds; yet the Lords found the assignation good for *L. 100* Scots. And it being stated, From what time this was to be computed and applied? the Lords drew it back to the date of the adjudication, and made it bear annual rent *ab eo tempore*, and rejected both the extremes of the date of the bond and of this interlocutor, and pitched on the middle period betwixt the two. Fountainhall, 20th July 1710, Hill *contra* Sclanders. ---- The contrary had been found formerly, that an assignation is not divisible. Stair, 21st June 1681, Coutts *contra* Straiton.

Testament
where the executor
is a subscribing witness.

A TESTAMENT being quarrelled, because the same person who was named one of the executors was also adhibite as a witness; the Lords found, That he could not be a witness in his own favours, and therefore reduced the testament so far as concerned the nomination of him as executor, but sustained it *pro reliqua parte*. Hope, (*Testament*) 1st July 1613, Crichton's nearest of kin *contra* bishop of Glasgow.

Verbal legacy
above *L. 100*.

FOUND, That a verbal legacy made after the defunct's testament, altho' the sum exceeded *L. 100*, yet being restricted to that sum might be proved by witnesses. Durie, 7th Auchinleck, (*Legacy*) 11th July 1629, Wallace *contra* Muir. Durie, 1st December 1629, executrix of Scot *contra* Raes the legatars.

Retour.

FOUND, That a retour, falling *pro parte*, is null *in totum*. Hope, (*Brieves*) 4th February 1619. Langton *contra*

Deed partly
ultra vires.

A TACK, set by a parson for more than three years, without consent of the patron, was not found simply null, but sustained for the three years. Stair, 18th July 1668, Johnston *contra* Parishoners of Hoddam. ---- But a college having set a perpetual tack of their tiends for 50 merks yearly, which were yearly worth 200 merks; and the same being objected to for want of power in the granters, who could not give such a tack without an adequate onerous cause; the same was found totally null, and refused to be sustained for any limited time or higher duty. Stair, Gosford, 13th July 1669, old college of Aberdeen *contra* the town. ---- Colonel Campbell being bound in his contract of marriage to provide the sum of 40000 merks, and the conquest to the children of the marriage, did, by a death-bed settlement, appoint his eldest son to be heir and executor, and left it to the Duke of Argyle and Earl of Islay to name rational provisions to his younger children; the referees having declined to execute the trust reposed in them, the younger children insisted in a total reduction of the settlement, claiming each of them an equal share in the special sum and conquest. It was pled for the heir, That the father had a power of division, and of giving more to one child, less to another; and *esto* he had given the whole to the heir, which at the same time was not his intention, the deed is only reducible so far as he transgressed his powers & *quoad excessum*; and therefore the childrens *quærela inofficiosa* can be carried no further than *ad supplimentum legitimæ*, to make them up rational provisions, such as the father ought to have left them; the Lords, notwithstanding, found, That the colonel having settled his whole estate upon his eldest son, without making any effectual provision for his younger children, his settlement

tlement is reducible; and that the younger children are each of them entitled to an equal share of his estate with the eldest son, in terms of the colonel's contract of marriage. 22d December 1739, Campbell *contra* Campbells.

INDUCIÆ LEGALES.

THE Lords found, That a declarator of right, which ought to be upon twenty one days, being privileged by a bill which is *periculo petentis*, should not be sustained being executed upon a shorter time, and ordained, That the writers to the signet should not insert in bills for summons a privilege dispensing with the law, and the *solennes induciæ* thereby introduced in favours of defenders, under the pain of 100 merks for the first fault, and deprivation for the second, except in cases which by the law are privileged, and named the president, advocate, and others of their number, to meet and consider what these should be. Dirleton, Stair, 14th June 1672, Wallace *contra* Purves. Privileged summons.

A SUMMONS raised and executed against him who is charged to enter heir before the time of the charge of forty days be expired, is null, and no process will be granted thereupon. Haddington, 14th February 1618, Gifford *contra* Colzier. ---- Found, That altho' summons upon a charge to enter heir was raised before the forty days were run, yet seeing it was not executed till they were expired, the same was sufficient. Durie, 8th February 1622, Ld. Muckall *contra* Innes. ---- The like. Hope, (Heir) 22d June 1621, Dunbar *contra* Hay. ---- The Lords sustained a general charge and summons thereon, tho' both were given on the same day and at the same time; because there were twenty one free days given for the first, and six for the second diet, after the out-running of the forty days appointed for the general charge. Fountainhall, 17th July 1702, Biggar *contra* Wallaces. ---- In a process of adjudication for implement of a special disposition, this objection being made, That before the forty days of the special charge to enter heir were run out, the party had raised his summons of adjudication, and executed the same within the forty days of the charge to appear upon twenty one days warning, a part of which twenty one days were coincident with the forty days of the charge, which is contrary both to law and form; the Lords found the general custom had so prevailed, that it might brangle many rights if condemned; and therefore sustained the adjudication, and repelled the nullity objected against it. Fountainhall, 30th November 1703, Sinclair *contra* Sinclair. If a summons upon the passive titles can be raised and executed during the running of the days of the charge to enter heir?

WHEN tutors and curators are cited edictally in a process against a minor, tho' they be out of the country at the time, there is no necessity they be cited upon sixty and fifteen days, and the minor will not be indulged further than the common *induciæ legales*. Forbes, 29th July 1710, Fairholm *contra* M'Kenzie. Citation of tutors and curators.

Inducia before inferior courts,

A BILL of advocation being presented by the defender in a process of scandal before a commissary, upon this reason, That the citation was upon two or three days, contrary to the act 19th Parl. 1621, which appoints inferior judges to issue out citations on no less than fifteen days; the Lords found the act in desuetude, and therefore repelled the reason of advocation, and remitted the cause back to the commissary as sole judge in the first instance to scandals; but with this direction, to allow the defender a competent time, not under eight days to propone his defences. Fountainhall, 23d-December 1701, Balfour *contra* Hay.

Inducie in a charge of horning,

NOTWITHSTANDING the act of parliament touching executions be north Dee, yet parties having agreed, that the execution of an horning should pass upon fewer days than therein mentioned, the horning so executed was sustained, specially there having intervened more than fifteen days betwixt the charge and the denunciation. Haddington, 8th March 1605, Hamilton *contra* Harvie. ----- A charge of horning given upon six days, to a person living be north Dee, was found null, altho' it was upon his bond, wherein he consented that letters of horning on six days should pass. Durie, 4th February 1625, Steuart *contra* Bruce. ---- The act of parliament, ordaining all hornings beyond Dee to be on fifteen days, reaches not to hornings, in which, by the agreement of parties, there are fewer days named. Stair, 16th December 1664, Ld. of Philorth *contra* Forbes of Aslocon.

In baron decreets,

A BARON'S decret may be executed incontinently, and needs not fifteen days delay. Haddington, 8th January 1611, Baillie *contra* Lord Torphichen. ---- The like. 18th February 1736, M^cQueen *contra* Stirling of Kier.

In a decret arbitral,

A PARTY being charged with horning upon six days, on a decret arbitral, which decret carried no days, but only, in form as effairs, which in decreets imports fifteen days, only here the submission carried six days; the Lords found, That the charge in this case might warrantably proceed on six days. Fountainhall, 17th January 1706, Balfour *contra* Lord Pitmedden.

Inducie in criminal sentences,

THE Lords found, That there needed no charge upon fifteen days to preceed, the poinding being for a fine in a fact tried by an inquest, for which the party might be instantly put in ward after the sentence, altho', in civil matters, a charge on fifteen days is required. Durie, 24th November 1629, Downie *contra* Brown. ----- A sheriff-deputy having fined an heretor for divers absences from head courts, and having summarily poinded the tenants for the amercement; the Lords thought, That this procedure was precipitant, being without a previous decret of poinding, and without deciding, whether these unlaws were *debita fundi*; therefore they found the poinding illegal. Fountainhall, 18th July 1700, Dundas *contra* Hardie.

In reductions and improbations,

THE Lords resolved, and caused intimate to the advocates, That thereafter they would give only two terms in reductions and three in improbations. Dirleton, Stair, 26th November 1667, Hay *contra* Drummond. ---- A decret of certification, in a reduction and improbation, was recalled upon the 20th article of the regulations 1695, which requires

quires, That certifications in absence shall remain unextracted for the space of four weeks after pronouncing; here it was understood to be in absence, a procurator being marked by the clerks at random, who was not the defender's ordinary procurator. December 1732, Fullertons *contra* Hume of Sclatohouse.

THE pursuer having referred the libel to the defender's oath, the Lords ordained the said defender to be summoned at the cross of Edinburgh, pier and shore of Leith on fifteen days, because he was summoned before on sixty days as forth of the country. Nicolson, (*Forth of the country*) 12th November 1619, Maxwell *contra* Steuart. --- But in a paralel case thereafter, a defender was ordained to be summoned to give his oath on sixty days. Nicolson, (*Forth of the country*) 26th January 1620, Wright *contra* Wright. In citations pro confesso.

ALTHO' brieves be appointed to be proclaimed on fifteen days, yet the Lords found it sufficient, if either the day of proclamation, or the day to which they are served, be counted in the number of the days, and that they need not both be free. Durie, 27th July 1626, M'Culloch *contra* M'Culloch. --- Found, That the last day of an execution of a horning *cedit debitori*, altho' in computing *de momento in momentum*, the whole six days be complete some hours before the last day run out. Colvil, December 1581, Menzies *contra* . Days how computed.

Annus deliberandi.

AN apparent heir of provision has the benefit of the *annus deliberandi*. Marcus, (*Exhibition*) February 1684, Forrest *contra* Scot. To whom competent?

THE *annus deliberandi* runs from the child's birth, if posthumous. Spotswood, (*Heirs*) 28th February 1627, Livingston *contra* Fullerton. From what time it runs?

A CHARGE to enter heir being raised and executed within year and day, it is sufficient if the last day of the forty was after the year and day. Haddington, 19th February 1611, Fairlie *contra* heirs of Blair. --- An apparent heir may be charged to enter any time after his predecessor's decease; but no summons can be executed against him till the year and day expire. Durie, Auchinleck, (*Air*) 19th June 1628, M'Culloch *contra* Marshall. Haddington, 17th November 1609, Fauside *contra* Adamson. --- In a transference of a compt and reckoning against an apparent heir, there was found no process, both the citation and day of compareance being within the *annus deliberandi*. Stair, 26th June 1667, Deuar *contra* Paterfon. --- A declarator of nonentry was sustained, tho' executed within the year, the day of compareance falling without the same. Fountainhall, 15th December 1709, Lockhart *contra* Chiesly. --- But in such a case the full mails will not be due. Forbes, 29th July 1710, Baillie *contra* Brown. What diligence may be done intra annum?

THO' reductions, declarators, and such like real actions, require no charge to enter heir, they are not competent within the year of deliberation, What actions may be pursued intra annum?

ration, because in these the heir cannot defend without behaving as heir. Stair, 26th June 1667, Deuar *contra* Paterfon. Marcus, (*Airs*) Ogilvie *contra* Home of Aiton. ---- For this reason, the Lords refused to allow a pursuer to transfer an action of reduction and declarator against an apparent heir *intra annum deliberandi*. Forbes, MS. 1st, 19th November 1713, Earl Dalhousie *contra* Lord Hawley and his children. ---- A decret of cognition being obtained against an apparent heir, was, after that apparent heir's death, allowed to be transferred against the next apparent heir, in order that an adjudication of the *hereditas jacens* might immediately pass, there being some danger of being excluded by prior apprisers: But the Lords declared, That if this apparent heir entered and infest himself within year and day, the adjudication should be redeemable by him within the legal reversion of ten years; by which neither was the creditor prejudged of his diligence, nor the heir of his privilege. Stair, 17th January 1666, Crawford *contra* Auchinleck. ---- Poining of the ground may be pursued *intra annum deliberandi*, in such actions there being no personal conclusion against the apparent heir, and his appearance subjecting him to no passive title. Fountainhall, 4th December 1702, Pitcairn *contra* Welwood.

Process, in
what cases it
must stop, the
defender dying
pendente
lite?

THE common debtor deceasing a few days before the day appointed for the judicial roup of a bankrupt estate, and his apparent heir then craving by bill a stop of the roup, and the benefit of the *annus deliberandi*; the Lords considering, that sales are summary executive processes, therefore, in this case, where the adjudications were expired, they found, That the apparent heir could plead no *annus deliberandi*. Fountainhall, 19th November 1708, Campbell *contra* Campbell. See act of sederunt, 23d November 1711, anent bankrupts, § 5. ----- A party in a pursuit for constituting a debt against four heirs portioners having called them all, but one of them having died *pendente processu*; the Lords refused to extend the act of sederunt in November 1711 to this case, and refused to give a diligence to call the next heir till the year and day were run. Fountainhall, 8th February 1712, Ramsay *contra* Forbes.

This privilege
how lost?

IF an apparent heir incur any of the passive titles, he may be pursued within the year of deliberation, because thereby he becomes personally liable, and can have no choice or deliberation whether he will subject himself or not. Stair, Dirleton, Gosford, 6th February 1677, Hamilton *contra* Bonnar. ---- The like, Auchinleck, (*Air*) 27th January 1637, Lore *contra* Crawford. Durie, 24th January 1627, Ld. Glenkindy *contra* Crawford. ---- An apparent heir renouncing, and the creditor thereupon obtaining decret *cognitionis causa* and adjudication; this objection, That the summons was within the year, being proposed by other creditors of the defunct, was repelled; because, by this voluntary renunciation, the heir had passed from a privilege which was only introduced in his favours. Durie, 14th July 1631, Blair *contra* Brown.

INDUCIÆ legales in warning to remove. See Removing.

INFEST-

INFESTMENT.

THE Lords preferred the first *fasine*, altho' the other charter was prior, granted by the king, and clothed with possession. Hope, *(Safine)* 25th March 1619, Leith *contra* Auchmutie. Safine an essential solemnity.

WHERE lands are mortify'd to the kirk, the Lords found, That there needs no *fasine* be taken thereof. Colvil, May 1581, treasurer of Edinburgh *contra* the comptroller. --- *Safine* not necessary upon charters made to burghs of their burgh and common lands. Hope, *(Safine)* 9th July 1628, town of Peebles *contra* Ld. Halton. --- Found, That for the constitutions of rights and mortifications to towns or hospitals, a *fasine* is necessary to denude the disposer in a competition with a singular successor, tho' *fasine* be not required for continuing such a right, in respect that *communitas non moritur*. Marcus, *(Infestments)*

March 1682, Findorph *contra* town of Brichen. --- Found, That a charter granted to a man's predecessors of small customs, was sufficient, altho' there was no special *fasine* taken of these customs; there being a *fasine* of the lands contained in the charter, and that there needed no special *fasine* of the customs, being *jus incorporium*, more than there needed one of the patronage of a kirk. Durie, 5th July 1632, sheriff of Forres *contra* town of Selkirk.

A RENOUNCIATION of an infestment was found not to be *habilis modus transferendi dominii*, unless it were in favours of one who has a reversion; in which case there is consolidation. Haddington, 18th June 1594, Reidpath *contra* Greenlaw. Renunciation not *habilis modus transferendi dominii*.

IN double resignations the first takes place, tho' *fasine* first pass upon the other, because by the first the resigner is denuded; and tho' resignation be *actus imperfectus*, yet *fasine*, when taken, is drawn back to the date of the resignation. Colvil, January 1588, Muir *contra* Muir. --- A second disposition first completed by a base infestment and possession, preferred to a prior disposition containing procuratory of resignation, upon which infestment past soon after the base infestment; in regard it is the *fasine*, and not the procuratory of resignation that denudes the disposer. Durie, 22d July 1626, *contra* . --- One infestment cannot be taken away but by another; upon which maxim it was found, That a resignation *in favorem* does not denude the former vassal; and that till the new vassal be infest the casualties of superiority fall by the resigner, and not by the acquirer. Stair, 14th November 1677, Purvis *contra* Strachan. Effect of resignation.

NOTWITHSTANDING of the act 27, parl. 1567, appointing *fasines* within burgh to be given by one of the bailies and common clerk, the Lords sustained such a *fasine* given by the sheriff-clerk, in respect there were no magistrates nor town-clerk in office at the time. Dirleton, 19th, Stair, 21st July 1666, Thomson *contra* M'Kittrick. --- A *fasine* within burgh-royal, given by the provost and a nottary, was sustained; the bailie and town clerk, appointed by act of parliament to give Infestment of burgh-lands.

give saine within burgh, being excluded from their office for not taking the tender. Stair, 3d July 1662, Thomson *contra* M^r Kittrick. --- The act 27th Parl. 1567, appointing saines within burgh to be given by the bailie, and common clerk, under the pain of nullity, was intended for the benefit of those officers as a perquisite to them; and therefore a base infestment in burgage-lands, given by the bailie, not as bailie of the burgh, but as bailie in that part, and the clerk as a common nottary, was sustained, seeing they were not prejudged thereby. Forbes, 5th July 1711, Bessie Bennet *contra* Slanders. --- The Lords found, That an infestment of burgage-lands from the king was not from the right superior, tho' the magistrates of royal burrows are reputed only the king's bailies, and burgage holds of the king; and therefore preferred a posterior infestment from the bailies and town-clerk. Marcus, (*Infestment*) February 1686, Countess of Kincardine *contra* Earl of Mar.

Base infest-
ment in bur-
gage-holding.

A LIFERENT infestment in burgage-lands, upon a precept of saine in an heritable bond to be holden blench of the granter, was sustained; for whatever may be said for the necessity of transmitting the property of burgage-lands by publick resignation, nothing hinders a servitude upon the property to be established by a base infestment. Forbes, 5th July 1711, Bessie Bennet *contra* Slanders.

Method of
obtaining in-
festment by an
heir.

UPON a sheriff's refusal to infest a party on precepts out of the chancery, the Lords granted warrant to the directors of the chancery to direct new precepts to a person specially designed to be sheriff in that part for giving the party saine. Auchinleck, (*Sheriff*) 13th July 1628, Dunbar supplicant. --- Where an immediate superior refused to enter a vassal, the Lords found, That his superior could not be charged to do the same by virtue of their Lordships deliverance upon a petition, but by precepts directed forth of the chancery. Colvil, May 1581, Orm *contra* Orm. --- A superior being denounced rebel for not entering his vassal, when charged thereto, and the next superior having resigned the superiority in the king's hands, the director of the chancery may give out precepts for infesting the vassal to be holden of the king. Durie, 18th December 1630, Stark *contra* Ld. Airth. --- If the immediate superior be not entred, he may be charged to enter heir within forty days, with certification, if he fail, to lose the superiority during his life, conform to act 1474, C. 57; and if he fail, the mediate superior may be pursued *via actionis*, to supply his place and receive the subvassal, under the same certification, without necessity of charging him with precepts out of the chancery. Durie, 29th July 1624, Ld. of Caprington *contra* Ld. of Kier. --- One being served heir in special before the bailies of the Cannongate, which being a regality having a proper chappel, the service could not be retoured to the king's chancery, nor precepts be had out of the chancery against the superior to charge him to infest; therefore the heir, upon supplication, obtained letters from the Lords to charge him, who declared, That so soon as the superior should be denounced, they would grant warrant to the director of the chancery to issue a precept for infesting the heir, for supplying the place of the contumacious superior. Stair, 25th June 1668, Heriot *contra* town of Edinburgh. --- A saine

fine of a house in a burgh of barony given by the bailie, was sustained, it bearing the parties retour therein insert, extracted out of the chancery to be warrant thereto, altho' it did not proceed by virtue of precepts out of the chancery, nor upon a precept of *clare constat*; and tho' the giving of fine upon naked retours, was alledged to be the peculiar privilege of royal burghs: But here the superior concurred with the party. Durie, 16th July 1629, Scot *contra* Deans. --- A superior being charged to enter a person to his predecessor's lands, and after the charge denuding himself; the letters were nevertheless found orderly proceeded, because he was *in pessima fide* to denude himself after the charge. Spotiswood, (*Superior*) Home *contra* Stewart.

WHEN the property and superiority coincide both in one person, he, as superior, may grant a precept for infesting himself as vassal. Durie, 21st June 1634, suppliant. Stair, Gosford, 26th November 1668, daughters of Morton supplicants.

FOUND, That because a superior was minor, and the land held ward, he could not infest the compriser; but that the diligence done against him should be as sufficient as if the compriser were infest. Spotiswood, (*Superior*) 15th July 1624, Edgar *contra* Ld. Craigmillar. --- A comprising being led and allowed in a superior's lifetime, and charges ordained to be directed against him before he died; but he deceasing before the compriser was infest, the Lords allowed summar charges to be directed against his apparent heir, without any other process, action or trial, if he succeeded to the right of the superiority; because if he were prejudged by the summar charge, he might suspend. Durie, 5th December 1628, Ld. Corsby *contra* Ld. Kilsyth. --- An heir served and retoured to a compriser, who had before his decease obtained a charge against the superior to enter him to the lands comprised, did not obtain the charge renewed in his own favours upon a summar application, tho' he would have obtained it by intenting action for that effect. Durie, 22d December 1626, Gordon suppliant. --- An heir retoured by general service to a defunct compriser, having petitioned the Lords to have the comprising allowed, and a command directed to the superior to receive him; his desire was granted without any process of transference, and without calling either the superior or the debtor. Durie, 11th February 1629, Fraser of Techmuirie suppliant. --- A superior is not *in culpa* or *in mora* by a charge, until the appriser present to him a charter upon obedience, and offer some money for his entry, and caution for what further the Lords should decern. Stair, 9th February 1669, Black *contra* French. --- The like. Stair, 3d February 1681, Ker *contra* Henderson. 24th June 1681, Oswald *contra* Cathcart. --- An appriser having charged a wrong superior to enter him, was allowed, upon a summar petition, new charges against the person who was alledged to be the right superior. Durie, 27th February 1630, Ld. Lochtower suppliant.

THE magistrates of a burgh having accepted resignation of a burgage-tenement in order to infest the purchaser, and having refused to grant the infestment; upon a summar complaint to the court of session, which was ordered to be intimated to the magistrates, the Lords

Method of obtaining infestment by an appriser.

By a singular successor after resignation is accepted of.

found, That in respect the procurators for the town did not deny, that the resignation was made in the magistrates hands, and accepted of by them, the magistrates must give a charter in terms of the former investitures, and they granted warrant for letters of horning to that effect. 22d February 1740, Lord Bracco *contra* magistrates of Bamff.

INEFFMENT not requisite to establish a servitude. See *Servitude*.

INHIBITION.

Style of inhibition.

IT being objected against an inhibition, that there was nothing in the letters prohibiting the lieges to lend their money to the person inhibited, and to take bond or other security therefore; that upon that account the inhibition could not strike against posterior bonds, tho' by these the heretage might be evicted; the Lords sustained the inhibition good against these bonds, in so far as they might come to affect the heretage in respect of the general clause, *Inhibiting and discharging the lieges under whatsoever colour or pretext, to buy, block, or receive any other manner of way from the debtor, any of his lands, heretage, &c. in defraud foresaid.* June 1727, competition Charles Row with the other creditors of Rusco.

If the debt must be condescended on in the inhibition?

AN inhibition being served upon a general charge to enter heir, the Lords found, That it was not a sufficient condescendence in the charge to mention the debt in general, but that it must be special. Fountainhall, 25th June 1706, Davidson *contra* Kendal and Robertson. --- The Lords sustained inhibition upon a general charge to enter heir, in so far as concerned debts particularly libelled in the general charge. Forbes, 17th February 1713, Livingston and Tait her husband *contra* Forrest. --- Inhibition upon a dependence valid, tho' it mentions not the special sum, or ground of debt upon which the process was raised. Home, November 1722, competition creditors of Tofts.

Inhibitions pass *causa cognita*.

OF old, inhibitions were only granted *causa cognita*, and might be superseded *simpliciter*, if found groundless, because they were then look'd upon as defamatory. Balfour, (*Inhibition*) 11th July, Sinclair, *ult.* July 1543, Maxwell *contra* Maxwell. --- Yet inhibition upon a depending action was even then allowed, only some document for instructing the debt was still required. Sinclair, 12th July 1543, Queen's advocate *contra* Earl of Crawford. --- Upon a party's application by bill, who alledged, That an inhibition upon a dependence was maliciously a raising against him by a liferentrix; the Lords remembred, That they had often interposed where inhibitions were groundlessly raised; therefore they discharged the registration of it till trial were taken what ground there was for it. Fountainhall, 15th February 1699, Murray *contra* Kello. --- The like. Fountainhall, 23d February 1704, Countess Dowager of Cassils *contra* the Earl and his tutor. --- A wife having by a summary petition represented her husband's extravagancy, and craving,

craving, That the Lords would allow inhibition to pass upon her contract of marriage, which bore no person at whose instance execution should pass; no answers being made, they referred it to the Ordinary on the bills, to take a summary trial of the husband's circumstances, and, if they found him extravagant, then to pass the inhibition. Fountainhall, 9th February 1706, Jean Wisheart suppliant.

FOUND, That an inhibition served against the father, cannot stop the lieges to purchase from the son, unless it be renewed against him. Inhibition but a personal prohibition. Haddington, Hope, (*Inhibition*) ult. June 1612, Peirie *contra*

FOUND, That notwithstanding the stile, inhibitions only affect heretable rights and lands; but that moveables falling under daily commerce, trafficking therein ought not to cease by a simple inhibition without arrestment. What subjects are affected by this diligence? Durie, 22th March 1623, Ld. Braco *contra* Ogilvie. --- Inhibition hinders not the conveyance of moveable debts. Durie, 24th March 1629, Dickson *contra* Ld. Hunthill. --- Inhibition strikes against after-bonds, in so far as they are the foundation of comprising, but not in so far as they are the ground of diligence against the debtor's person or moveables. Durie, 22d February 1631, Ld. Corbie *contra* Atchison. --- Found, That the price of lands (like other moveable subjects) is not affectable by inhibition or interdiction. Falconer, 9th December 1685, M'Intosh and Somervell *contra* Primrose. --- Inhibition, as it bars alienation of lands, so it bars contracting of debt, by which lands may be attached, but it does not bar the debtor to alienate other heretable rights, nor is there any clause in letters of inhibition directed to that end; and therefore the Lords found, That an assignation of an heretable bond, upon which infestment had not followed, tho' containing a clause to infest, was not reducible *ex capite inhibitionis*. Dalrymple, Fountainhall, 31st December 1703, Oliphant *contra* Irvine. --- In a competition betwixt Taylor and the other creditors of Mr. David Watson, the Lords found, That inhibition is not a habile diligence for affecting the emoluments or price of any office. 17th December 1725. --- A tack of tiends cled with possession, preferred to a prior tack set by the same author, which never attain'd possession, albeit there was inhibition executed upon the first tack, before granting of the second, which was found not sufficient to put the second tacksmen *in mala fide*, seeing the common author had still remained in possession of the tiends until he took the tack from him. Durie, 23d June 1627, M'Millan *contra* Gordon. --- Found, That inhibition impedes not the party inhibited, being a beneficed person, to renew tacks to the kindly tacksmen within the years of the old tacks. Hope, (*Inhibition*) 28th January 1603, Ld. Bandean *contra* Ld. Balgerno.

AN inhibition against the apparent heir of a debtor was sustained, altho' he was neither entred nor lawfully charged so to do, seeing there- Reaches adquirenda. after he served himself heir, and sold the lands. Durie, Haddington, 5th July 1623, Kirkwood *contra* Belsches. --- Inhibition reaches both *acquisita* & *adquirenda*. Stair, 15th December 1665, Elies *contra* Keith. See also, 27th February 1667, *inter eosdem*. --- The Lords found, That inhibition extends not only to *acquisita*, to what stood in the debtor's person the time of executing the inhibition, but likewise to *adquirenda* if the lands ly in the same shire where the inhibition

was published, as had been often decided. Fountainhall, 16th July 1700, creditors of Langton competing.

Has effect
only against
voluntary
deeds.

A PARTY inhibited, being bound to dispose certain lands before the inhibition, may implement such an obligation after inhibition, and the right will not be reducible *ex capite inhibitionis*; but on the contrary, will be preferable to any posterior infestment granted even to the inhibitor. Durie, 6th March 1639, Scotstarbet *contra* Boswel.--- Found, That a man who is inhibited may, if he marry, dispose in conjunct-fee and liferent to his wife *ad sustinenda onera matrimonii*, such a right not being perpetual, but only suspending all action during the wife's lifetime. Colvil, July 1592, Ld. Cullerny *contra* Sibbald. --- An infestment of property was reduced *ex capite inhibitionis*, notwithstanding it referred to a contract prior to the inhibition, by which the person inhibited became bound to infest the defender in a yearly annualrent, because an obligation to grant an infestment of annualrent is not an obligation to convey the property; and also, because the infestment of property behoved either to stand or fall *in totum*, and could not subsist *pro parte* and vanish *pro parte*. Hope, (*Inhibition*) 14th March 1614, Oliphant *contra* Keith. --- The like, Durie, 21st January 1629, Scot *contra* Turnbull. Durie, 8th March 1631, Brown *contra* Murray. --- An infestment of property was sustained tho' after inhibition, because it related, that the party was obliged to infest the defender in an annualrent out of any of his lands, and the lands disposed were worth less than the sum to which the annualrent effeired. Hope, (*Inhibition*) ult. January 1617, Stirling *contra* tenants of Lethindie. --- An infestment of annualrent after inhibition was sustained, being in implement of a contract of marriage prior to the inhibition, bearing an obligation *to infest the wife in lands and annualrents for such a sum*; tho' here the obligation was only general, and not to infest her particularly in the land in question. Stair, Gosford, 10th February 1672, Beg *contra* Beg. --- The like, 22 July 1675, Gordon *contra* Seaton. 23d June 1681, Gardner *contra* Bruce. --- An obligation to provide children of a marriage to a sum, or to a wadset equivalent, altho' in general, was found to secure a special infestment, altho' inhibition was served before the infestment. Gosford, 24th June 1673, Haliburton and her husband *contra* Morison. --- An obligation in general to dispose lands to a creditor for his security, without condescending on any particular subject, found a sufficient necessary cause to support a posterior disposition of particular lands, against a reduction *ex capite inhibitionis*. Gosford, 21st July 1675, Menzies *contra* . --- An inhibition was found to strike against an heretable bond granted posterior to the inhibition, but in corroboration of a personal debt anterior thereto; because inhibitions strike against all posterior voluntary rights. And as to this question, all rights are considered as voluntary, to grant which there is no preceeding specifick obligation, such as can be made effectual by way of process. Auchinleck, (*Inhibition*) 9th March 1633, Fleeming *contra* his creditors. Marcus, (*Inhibition*) 1st December 1681, Pittarrow *contra* Arburthnot. Forbes, 14th February 1708, Fountainhall, 1st July 1709, Strachan *contra* town of Aberdeen. February 1730, Campbell *contra* Drummond. --- Adjudication on a bond of corroboration being led, when both the corroboration and adjudication were posterior to a

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another creditor's inhibition, tho' the principal bond was prior to it, and expressly narrated in the bond of corroboration; yet, in a reduction at the inhibitor's instance, the Lords, by plurality, found, That the inhibition did not only cut off the bond of corroboration, but also the adjudication thereon, and found it null *in totum*; tho' divers of the Lords were for supporting the diligence *quoad* the sum contained in the bond corroborated, as more equitable. Fountainhall, 29th January 1696, Wilton and Logan *contra* Penman. --- A minor having disposed some tenements to a creditor for his security, when he wanted but some few months of majority, obliging himself to reiterate and renew the same; and after majority granting to this creditor a new disposition of the same tenements and some others for security of his former debt, but without any special relation to the prior disposition, or the said obligation therein contained; but only saying, It was just the creditor should be fully secured of his money. And on this second disposition the creditor being infest, in a reduction of this last disposition by a creditor inhibitor, as posterior to his inhibition, the Lords repelled the reason of reduction upon the inhibition, and found, That the second depended on the first, and was in implement thereof, as to the tenements contained in the first, but no further; seeing *quoad excessum* it was a new voluntary right, without an antecedent cause. Fountainhall, 3d July 1700, Dunbar *contra* Osburn. --- A party having, after he stood inhibited at a creditor's instance, disposed certain lands to others in implement of his anterior bond, to relieve them of their obligation to infest a lady in these lands; the Lords found the disposition sufficiently supported against reduction *ex capite inhibitionis*, by the bond of relief granted before the inhibition. Forbes, 16th January 1713, Gordon *contra* Gordon and others.

IF inhibition strikes against redemptions of wadsets, renunciation of annualrent rights, and other redeemable rights, debated, but not determined. Stair, 27th February 1667, Eleis *contra* Wiseheart and Keith. --- Determined in the negative betwixt the same parties. Stair, Dirleton, 16th July 1667. --- Poining of the ground for an annualrent comprised from the annualrenter, was sustained, notwithstanding the annualrenter had renounced, but after inhibition served by the compriser before the renunciation. Haddington, 26th February 1622, Burts *contra* Gairntully. --- Inhibition was not found to reach a renunciation of an infestment of annualrent, or discharges granted by the person inhibited upon true payment. Stair, 7th January 1680, M'Clellan *contra* Muschet. See the act of sederunt, 19th February 1680, *anent the taking renunciations from persons inhibited*.

If it strikes
against re-
nunciations?

INHIBITION was not found to exclude or burden a recognition. Stair, 16th December 1680, Hay *contra* Lady Balgerno. Home, March 1683, King's advocate *contra* creditors of Cromarty. --- This was where the party inhibited himself, who stood in the absolute fee, had done the deed which inferred recognition: But where the inhibited person had disposed with consent of the superior, a deed inferring recognition done by the disponee, was found not to prejudice the inhibitor; because *quoad* him, the disposition by the inhibited person with all the consequences thereof, was understood to be void and null. Har-

If good a-
gainst recogni-
tion?

cus, (*Recognition*) July 1687, Sir John Falconer *contra* Ballantine. See act 15, parl. 1686.

If good against a conditional alienation?

IN a reduction *ex capite inhibitionis*, it was objected, That there could be no reduction, there being no direct alienation, but only conditional, which might possibly never exist, it being a disposition of lands in warrandice only: The reduction was sustained to take effect so soon as eviction should happen, which would purify the condition of the disposition. Stair, 10th December 1667, Hog *contra* Countess of Home.

If it not only protects the debt, but all diligence following thereupon?

A CREDITOR having used inhibition, and thereafter apprised for the sum; in a reduction *ex capite inhibitionis* of an alienation made after the inhibition, but before the apprising, the defender offered to satisfy the whole sum *cum omni causa*, upon which the inhibition was deduced, which was not found relevant, in respect the other diligence, by apprising, was expired, which was also led upon that debt, after which it could not be redeemed or extinguished by payment. Stair, 24th February 1666, Grant *contra* Grant. --- The like. 8th July 1670, Lady Lucie Hamilton *contra* Boyd. --- In a reduction *ex capite inhibitionis* against real rights, the Lords found the inhibition purgeable upon payment of the principal, annualrent and penalty in the bond, without respect to the accumulated annualrents and sheriff-fee, contained in an apprising led thereupon. Falconer, Marcus, (*Inhibition*) 9th February 1683, Trotter *contra* Lundie.

But inhibition has effect only from the decret of reduction.

A REDUCTION *ex capite inhibitionis* has no effect but from the date of the sentence; because a deed of alienation by a person inhibited, is not simply void, but voidable only; and therefore the bygone rents before the date of the sentence, even those *in medio* unuplifted, were found to belong to the disponent, and affectable by his creditors. Falconer, Marcus, (*Inhibition*) 1st February 1684, Crichton *contra* Anderson.

Operates not in favour of third parties.

FOUND, That a reduction of a man's infestment, at a prior creditor's instance upon a preceeding inhibition, could not hinder the said party who was infest lawfully, to use his infestment against any other person, specially to defend his possession against others who could pretend no interest in the inhibition. Durie, 26th January 1636, Lady Borthwick *contra* Ker. --- A title may be sufficient to found a reduction and improbation, tho' reduced *ex capite inhibitionis*, because reductions *ex capite inhibitionis* are, properly speaking, declarators, concluding only, that notwithstanding the alienation, the inhibitor should have access to affect the lands alienated. Stair, 7th January 1680, Hay *contra* Lady Balgerno.

Effect of the reduction how restricted by the pursuer's want of interest?

A SALE of lands was found not reducible *ex capite inhibitionis*, where the purchaser was taken bound to apply the price to purge infestments of annualrent upon the subject, which were preferable to the reducer's right; because here the inhibitor could qualify no benefit by the reduction. Durie, Spotiswood, (*Inhibition*) 6th February 1635, Ross *contra* Dick. --- The defence was also found relevant, that the price was to be applied to satisfy debts prior to the inhibition, which debts

debts the debtor stood bound to secure by infeftment in his land ; for this was found to be the same as if the debtor had given the infeftment directly to these creditors. *ibid.* ---- Found, That a prior inhibitor might reduce *in totum* a posterior bond and comprising, altho' the sum comprising for was small, and the subject sufficient to pay both ; and he was found not obliged to restrict his reduction to part of the lands what might be sufficient to satisfy his debt. Durie, 27th November 1630, Douglas *contra* Johnston.

INHIBITION upon debts conditional, or in diem, or upon dependence. See Legal Diligence.

EXECUTION of letters of inhibition. See Execution.

REGISTRATION of inhibitions. See Registration.

INNOVATION.

FOUND, That *in rigore juris* the taking a bond of corroboration does not cut off preceeding annualrents ; because a man may renounce his bonds of corroboration, and pass from them, and take himself to the bonds corroborated, and charge on them, except they be expressly innovated. Fountainhall, 24th January 1696, the children of Thomas Kincaid *contra* Mr. James Daes. ---- A bond of corroboration being granted and delivered by a third party to a creditor, and he some days thereafter returning it, as not being pleased therewith, the Lords found, That the creditor might make use of this bond, or repudiate the same at his pleasure. Bruce, 2d February 1715, Grant *contra* Donaldson.

In a poinding of the ground upon an infeftment of annualrent, the tenants excepting, That the annualrenter had thereafter taken infeftment of the property under the redemption of a certain sum, in which was contained the former ; the Lords found, That the acceptance of a new right did exclude him from making use of the former, as long as the latter was not quarrelled ; but that if he were put from it, he might have recourse to his former right. Spotiswood, (*Dominium*) 30th June 1625, goodman of Raploch *contra* tenants of Letham. ---- The Lords found, That where a creditor takes a wadset after a comprising, tho' only in corroboration, yet it is in satisfaction, and restricts to these wadset-lands ; and the only difference is, that he may recur to the comprising if his wadset be reduced. Fountainhall, 28th November 1678, Gordon *contra* Gordon.

BLVD and Rankin in company, gave commission to Davidsons, merchants in Rotterdam, to load a certain cargo, the amount whereof they promised to pay ; and the cargo being safely arrived, Blyd soon thereafter advises Davidsons of the same, and among other things has these words, *You may transfer the accompt of the company goods to my particular accompt.* By return to this letter, Davidsons tell Blyd, *That*

at his desire, they shall place the amount of the cargo to his particular accompt. Upon the sight of this letter, Rankin, the other partner, paid in to Blyd his proportion of the price of the cargo; and Blyd soon thereafter giving way, Ranken was attacked for the whole price: His defence was, That Davidsons, the pursuers, had taken themselves entirely to the faith of Blyd the other partner, by transferring the accompt of the company to his particular accompt, whereby there was a novation of the debt, that released him the defender; especially having, upon the faith of the pursuers letter, paid in his proportion to Blyd: the Lords sustained the defence, this weighing with them, that the transaction could have no other sensible meaning than to liberate Rankin, which was obtained by Blyd in this view, to afford him credit against his partner. 20th June 1733, Davidsons *contra* Rankin.

INTERDICTION.

Virtual interdiction.

AN obligation, *Not to contract debt or dispose lands, without the consent of such and such persons*, and inhibition registered thereupon, was sustained, tho' not in the ordinary stile of interdiction, the person bound up being insufficient to manage his affairs through levity and prodigality. Stair, 10th November 1676, Stewart *contra* Hay.

Solemnities in publication.

THE Lords found, That in the publication of a voluntary interdiction, no other solemnity was necessary but the proclamation at the mercat-cross, and that intimation needed not be made to the party. Durie, 11th December 1622, Seaton and Elies *contra* creditors of Atchison.

What effect it has before publication?

The Lords found, That private knowledge of an interdiction puts not the party *in mala fide* to contract with the interdicted person; but publication of the interdiction is indispensably required. Colvil, November 1586, Cranston *contra* Cranston. --- Found, That a bond granted by an interdicted person, in favours of one of his interdictors, was reducible *ex capite interdictionis*; and this altho' the interdiction was never published, because the interdictor was presumed sufficiently certified already. Haddington, 22d February 1612, Graham *contra* Stewart and Balfour. --- Found, That the interdictor, unless the interdiction be published, may acquire from the party interdicted. Hope, (*Interdiction*) 19th January 1621, Pringle *contra* Borthwick. --- It was found relevant to reduce, that a gratuitous bond was granted to an interdictor after the interdiction was delivered to him, tho' before publication thereof. Stair, 24th July 1678, Grierison *contra* Telzifer. --- John Tennant having granted a voluntary deed of interdiction to Robert Spruel his sister's son, who was also writer thereof; and having thereafter made a revocable settlement of his estate, failing heirs of his own body, to this said Robert Spruel interdictor; in a reduction of that disposition, at the instance of the disposer's younger sisters after his decease, the Lords found, That Spruel being the writer of the interdiction, and keeping it in his custody, could not accept of the disposition in question; altho' it was pled, That the interdiction was never published

blished, and therefore an unfinished deed without any effect. December 1725, Tenants *contra* Spruel.

INTERDICTION has no effect as to lands not lying within the jurisdiction where it is published and registred. Stair, 11th February 1662, Ramfay *contra* M'Clellan. What effect after publication?

INTERDICTION has only the same effect with inhibition, and operates nothing as to moveables, nor hinders personal execution. Spotiswood, (*Interdiction*) 15th March 1637, Brown *contra* Lands. Durie, Spotiswood, (*Interdiction*) 11th July 1634, Bruce *contra* Forbes. Stair, 20th July 1671, Crawford *contra* Halyburton. Stair, 11th February 1662, Ramfay *contra* M'Clellan. Stair, 24th July 1678, Grierfson *contra* Telzifer. --- A sum being only moveable, the Lords found, That any interdicted person needed not the consent of his interdictors to the uplifting thereof. Fountainhall, 8th February 1684, Davidson *contra* town of Edinburgh. --- Found, That interdicted liferenters may dispoise their liferent without consent of the interdictors, seeing the *jus formale* of the liferent is not dispoised, but the *usus fructus*, which falls under the party's single escheat. Marcus, (*Interdiction*) March 1685, Provost Irvine *contra* M'Briar of Netherwood. Has no effect as to moveables, or personal execution.

THE Lords found, That a person interdicted may freely dispoise a fuitable liferent or conjunct-fee to his spouse. Colvil, July 1582, Sempil *contra* Noble. *Nota*, the *ratio decidendi* here was, That the relict having a terce of the lands, and being served therein, was content to renounce her terce for her conjunct-fee. --- An interdicted person being charged with horning, to do any thing in obedience to his majesty's commands, and to find caution for that effect; the interdictors having refused their consent to his bond for relief of his cautioners, the Lords supplied it by interponing their authority to the said bond, to make up the want of the interdictors consent. Haddington, 7th February 1607, Earl Athole *contra* . --- Found, That a person interdicted could not grant a tack, altho' to a kindly tenant, without his interdictors consent. Hope, (*Interdiction*) 5th March 1613, Douglass *contra* Cranston. --- An interdicted person's bond was sustained, altho' granted without consent of the interdictors, being to a tradesman for the price of his work and wages. Durie, 29th July 1624, Ld. Collingtoun *contra* Faw. --- The like with regard to a bond granted for furnishing. Fountainhall, 22d June 1697, Bowman and Pollock *contra* Earl Kilmar-nock. --- A disposition made by a person interdicted, without consent of the interdictors, was found not to be *ipso jure* null, but only reducible upon lesion; and so an allodgeance, that it was for an adequate onerous cause, was found relevant, and admitted to probation. Gosford, 27th February 1672, *contra* . --- A person interdicted, having granted bond for a sum to his brother's children, with which sum, by the disposition of the estate to him, he was allowed to burden it; but this being quarrelled after his death by his heir of tailzie as a gratuitous deed, the Lords found, That the deed, having an antecedent cause, was rational, and sustained the bond. Fountainhall, 26th July 1711, Rae *contra* Maxwell. *Nota*, This decision is also observed by Mr. Forbes, but, as he sets down the pleadings, all running upon the power of interdictors, so he marks the interlocutor as going the same way. *viz.* That the Lords sustained the bond (as indeed they did) tho' gratuitous, Strikes not against onerous or rational deeds.

it being granted with consent of the interdictors; which question, Fountainhall says, was industriously shunned by the Lords as a very dangerous preparative.

Interdictor's consent, if it must be formally adhibited?

A BOND by an interdicted person was reduced for want of the consent of those to whom he was interdicted, tho' one of them signed as cautioner, and the other promised to subscribe the bond. Durie, 12th February 1633, Forbes *contra* Forbes.

Interdictor *author in rem suam fieri nequit.*

AN obligation granted by an interdicted person in favours of his interdictor, found null by exception, unless the receiver would prove *pecuniam in rem interdicti versam fuisse*. Haddington, ult. February 1607, Wardlaw *contra* Wardlaw.

Voluntary interdiction falls by the death of the interdictors.

A PARTY having voluntarily interdicted himself, and then granting a disposition to his estate; and a *quorum* of the interdictors thereafter dying, and he then granting a ratification of the first disposition, the Lords, in a reduction of this ratification, thought there was a difference betwixt a voluntary and a judicial interdiction; for where it is judicial, it cannot be taken away but *causa cognita*, that he is become *sciens & prudens*, which is not requisite in a voluntary interdiction; and altho' the levity here continued, yet the interdiction ceasing by the death of the *quorum*, they found him a free man, and sustained his ratification, and assailed from the reduction. Fountainhall, Forbes, 8th December 1708, Hepburn *contra* Hepburn.

Reducible where destitute of a rational foundation.

REDUCTION of an interdiction was found relevant upon this only reason, that it was made immaturity without any cause & *sine causæ cognitione*, to the discredit of the party, and prejudice of his liberty in administering his own. Haddington, 2d July 1607, Ld. Auchinbowie younger *contra* his interdictors. --- The Lords reduced an interdiction *ex nulla alia causa*, but because it was *sine causæ cognitione*. Hope, (*Interdiction*) 30 January 1618, Robertson *contra*.

----- Reduction of a bond of interdiction, whereby the party was obliged not to sell without the interdictor's consent, or, if he did, to pay a sum of money by way of penalty *toties quoties*, was sustained, being founded on this reason, That the party was *rei suæ providus & non prodigus*, and that the bond of interdiction was *contra bonos mores*; notwithstanding it was alledged, that the said bond was granted for sums of money & *ex causa onerosa*; and that the interdiction was not simple, but resolved in a penalty; and that the prestation contained in the bond was not impossible *de jure*, nor *contra bonos mores*: But the confession of sums was not regarded unless the interdictor could instruct real numeration: For the Lords thought, that the same influence which procured the bond, might procure the false narrative. Hope, (*Interdiction*) Durie, Haddington, 20th December, Spotiswood, (*Interdiction*) 21st December 1622, Campbell *contra* Ld. Glenurchie.---Found, That a man interdicted may reduce the interdiction, as being *rei suæ providus*, if no cognition was taken by a judge at the interdiction, that the party could not govern his own affairs. Haddington, Durie, 4th December 1623, Gichen *contra* Davidson. --- In a reduction of a voluntary interdiction, at the instance of the party himself

himself, the Lords appointed some of their number to confer with him; and upon their report, that he was rational and intelligent, and for any thing appear'd by his discourse and deportment, *rei sue providus*, they reduced in absence, there being no compearance for the interdictors. Dirleton, 25th July 1666, Wilkie *contra*

----- In a reduction of an interdiction, (which carried in the preamble, that, the party was lavish and prodigal) on this ground, that it was elicited from him when he was overtaken with drink; the Lords considered, that, as the narrative of the party's levity was not to be wholly trusted, so neither was it totally to be discredited; they therefore ordained the defender, before answer, to condescend on and prove such acts of levity as he could, whether prior to the interdiction or subsequent; and the pursuer, for eliding the same, to prove his frugality and provident administration of his own affairs; and declared, that at advising they would cause sist the young man before them, and try his behaviour. Fountainhall, 10th February 1698, Hunter *contra* Hunter. --- The Lords reduced a voluntary interdiction made *fine causæ cognitione*, at the instance of the interdicted person, unless the interdictor, in fortification of it, would prove the narrative of levity, and facility on which it proceeded; but here the interdictor was passive. Fountainhall, 23d June 1699, Gordon *contra* Dick. --- A lady having entail'd her estate, but without an irritancy *de non contrahendo*, did oblige herself not to alter, nor to contract debt without consent of friends therein named, and letters of publication of this interdiction were raised, executed and registred. In a reduction *ex capite interdictionis* of an heritable bond granted thereafter by the lady, it was argued for the creditor, That this voluntary interdiction can signify nothing, unless lavishness, prodigality or facility be alledged. The Lords, nevertheless, sustained the interdiction as valid, and reduced the debt. Fountainhall, 23d December 1703, Row *contra* Bruce.

THE Lords found, That an interdicted person cannot so much as pursue reduction of a deed of alienation of moveables done by him after the interdiction, unless his interdictors concur in the action. Maitland, 14th March 1554, Ure *contra* Mitchelson. --- In a reduction of a bond granted by the interdicted person to one of his interdictors, found, That he needed not the concurrence of his other interdictors to the reduction. Haddington, 22d February 1612, Graham *contra* Stewart and Balfour. --- The interdictors may pursue a reduction of an alienation made by the interdicted person, tho' he does not concur, or tho' his apparent heir after his death do not concur. Haddington, 20th December 1593, Ld. Ruthven *contra* Crichton. Haddington, 21st December 1610, Ld. Broxmouth *contra* relict of Wauchop. --- In a reduction of an interdiction, at the instance of a contractor with the interdicted person; the Lords found, That the interdiction could not be reduced at the instance of the said party who had acquired right from the interdicted person, because the said party, who was interdicted himself, craved not the interdiction to be loosed; and the said pursuer was *in pessima fide* to contract with him till it had been lawfully loosed by the judge. Hope, (*Interdiction*) 27th November 1613, Sanderson *contra* Craig. --- John Tennant having granted a voluntary bond of interdiction to Robert Spruel his eldest sister's son, who was also writer thereof; and having thereafter made a revocable settlement

Reduction
upon this head
to whom com-
petent?

of his estate failing heirs of his body, to the said Robert Spruel interdictor; in a reduction of that disposition, at the instance of the interdicted person's younger sisters, after his decease, the Lords found, That Spruel, being the writer of the interdiction, and keeping it in his custody, could not accept of the disposition in question, altho' it was pled, that interdiction hinders not a man to do rational deeds, (and here the disposition was of a small subject to an eldest sister's son, to prevent its mouldering to pieces amongst heirs portioners, which was rational and prudent) in respect it was answered, That interdiction operates in favours of heirs: So that 'tis sufficient to found a reduction upon this head, that the interdicted person himself or his heir is lesed. 27th December 1725.

ONE cannot interdict himself to his wife. See Pactum illicitum.

BOND granted by one interdicted, if it prove its onerous cause? See Proof.

INTIMATION.

BACKBOND effectual without intimation. Gosford, 6th July 1676, Gordon *contra* Skene. Stair, 4th January 1668, Forbes *contra*

INTRUSION.

A PARTY was affoizled from intrusion and wrongous intromission with the rents of lands, because the pursuer did not libel his own possession. Sinclair, 14th July 1542, Ld. Innes *contra* Ld. Cairdel.

A PARTY removing himself, his goods, &c. from the ground, *animo remanendi*; the Lords found, That he could not thereafter pursue intrusion against him who entered *in vacuum possessionem*. Erskine, 26th June 1573, *contra* Ld. Inchbraikie.

A REMOVING sustained at the instance of a compriser infest, and in possession above a year by uplifting rents from the tenants, altho' the defender was infest before the comprising, and had also a gift of liferent escheat, in respect he had not attained the possession in a legal way, but by entering to the void possession of the house clandestinely when the tenant removed at the term; and the pursuer was not put to a new action of intrusion, but his right of possession was sustained by a reply in this process of removing. Durie, 7th December 1627, Lauder *contra* Ld. Aitken.

Tho' the natural possessor can only claim *juramentum in litem* in violent profits, yet the master of the ground may pursue intrusion for dis-

dispossessing the intruder, and for the ordinary profits. Stair, 18th January 1681, *Cant contra Harris*.

IRRITANCY.

A FEU-CHARTER was reduced for two years running on unpaid, altho' no special provision was made thereanent in the charter. Balfour, (*Feus*) 8th March 1525, Abbot of Cambuskenneth *contra* Ramsay. 15th January 1533, Prior of Charter-house *contra* Borthwick. ---- The same found with respect to lands feued out by the king. Balfour, (*Feus*) 5th September 1517, the king and his comptroller *contra* Ld. Tullibardin. ---- A feu was reduced upon act 25th, parl. 1597, for not payment of the feu-duty for two years, altho' the charter contained no clause irritant. Durie, 25th November 1623, the Earl Melrofs *contra* Ld. Bafs. ---- Found, That a back-tack ought to expire for not payment of the feu-duty, in the same manner as is observed in a tack set to a tenant. Hope, (*Wadset*) 8th June 1614, Dishingtoun *contra* Lady Pittenweem. Fountainhall, 29th November 1683, Dick *contra*

Legal irritancy *ob non solutum canonem.*

FOUND, That where the clause irritant carried, That the tack should fall if two terms should run in one; the expiring of two terms without payment made the tack void, but where it bore two terms running in the third, that then it required three terms to expire unpaid before the tack should fall. Haddington, 9th March 1611, Seton *contra* Seton. ---- An irritant clause bearing *If two terms should happen to run in the third unpaid, in that case, &c.* Found that this clause imported, That the third term behoved to be complete. Stair, Gosford, 19th June 1673, Smith *contra* Earl Marischall. ---- In a declarator of irritancy of a tack, founded upon this clause, "That in case the saids tacksmen should fail in punctual payment of the said tack-duty therein mentioned, so far as that two years tack-duty should run in the third unpaid, that then the said tack shall be, *ipso facto*, void and null, without any declarator or process of law." The defence was, *Esse* the tack-duty for two full years were entirely due, no declarator of irritancy, because the import of the clause is, *In case two years rent should run in the third unpaid*, so that no less than three full years rent falling at once to be due could found such a declarator. Answered, The natural signification of this clause, is, *That two years rent shall run into the third without being paid*, or simply, *That two years shall remain unpaid*; because it is inconsistent, that two years rent should remain unpaid, without running into a third year. Found the irritancy in the tack incurred, and that so soon as the two years tack-duties were run, and the third running unpaid. 19th February 1729, Lady Barrack and her husband *contra* the tacksmen of the lands of Reiskill.

Conventional irritancy *ob non solutum canonem.*

FOUND, That a superior could not pursue reduction of feus, for not payment of the duties of the years wherein himself was not infest.

What if the superior be not infest?

Hope, (*Clause irritant*) 16th December 1614, Duke of Lennox *contra* inhabitants of St. Andrews.

What if part
be paid?

IN a declarator of irritancy of a back-tack set by a wadsetter, for not payment of the tack-duty for two years; this exception was sustained, That the pursuer had possessed a house of the lands set in back-tack, the rent of which behoved to impute in payment of his back-tack-duty; and therefore a part of it being paid, no irritancy was incurred. Durie, 18th March 1629, Barclay *contra* Stevenson.---- IN a process of reducti-
on of a feu, *ob non solutum canonem* within three years, the defen-
der was assolizied, because the pursuer had received a small part of
one year's duty. Maitland, 27th April 1553, Bishop of Dumblane
contra

Effect of a
clause, *si petatur tantum*.

THE Lords found the irritancy in a feu *ob non solutum canonem*, not incurred by many years rests, but allowed a time to pay and purge, because the *reddendo* bore *si petatur*, and it was never demanded till this declarator and reduction. Fountainhall, 27th July 1680, Earl of Mar *contra* Frazer.

Legal irri-
tancy upon af-
signing or sub-
setting a ren-
talright.

A RENTALLER, by setting the lands in tack, forfeits his rental. Durie, 13th November 1622, Bonnar *contra* Nicolson.---- A rental-
taller assigning or subsetting a part, forfeits so much as he assigns or
subsets. Haddington, Hope, (*Rentaller*) 23d February 1610, Hamil-
ton *contra* Boyd. Hope, (*Rentaller*) 14th November 1622 Nicol-
son *contra* Bonnar.---- A rental found null *in totum* by way of excep-
tion, the rentaller having assign'd more than half of the rental
lands without the master's consent; but if less than the half had been
assign'd, the irritancy would not have taken effect, except as to the part
assign'd. Durie, Hope, (*Rentaller*) 21st March 1623, Ld. Craigie *contra*
tenants.---- The inputting of a subtenant has not the effect of a for-
feiture where there is no subtack, disposition, or other deed done in
writ. Durie, 31st January 1633, Ld. Cleghorn *contra* Crawford.
Durie, 5th July 1625, Ld. Ayton *contra* tenants.---- A rental being
set to a man, without mention of his heirs or assigneys, and he never-
theless assigning the same, the rental was found null by exception at
the instance of the fetter. Spotiswood, (*Rental*) Auchinleck, (*Rental*)
Durie, 26th February 1630, Lockhart *contra* tenants of Bothwell.
---- An assignation of a rental having taken effect by possession, which
was a forfeiture of the rental, the assigney's taking a subset from the
rentaller, after the irritancy was thus incurred, was found not sufficient
to support him in the possession. Durie, 21st February 1632, Ld.
Johnston *contra* Johnston.---- Found, That the setting of tacks
by a rentaller, which rental contained a clause irritant, if he made
any disposition or alienation of the rental, did annul the samen, but
that setting of tacks to the rentaller's eldest son, did not. Had-
dington, Hope, (*Rental*) Nicolson, (*Clause irritant*) 19th March
1622, Earl Roxburgh *contra* Gray.---- Found, That an assignation
made by a rentaller in favours of his own children, was not such a deed
as to make the rental fall, specially seeing he retain'd the possession
with his children. Durie, Auchinleck, (*Removing*) 28th July 1630
Lady Maxwell *contra* tenants.---- Found, That a rentaller, by
compact excambing with another rentaller, where the rentals were
both

both of a like quantity of ground, and where the excambion took effect by exchanging possession conform thereto, the rental thereby was extinct, and that the parties had lost the benefit thereof; altho' in the contract of excambion, it was provided, That if the fetter should not allow thereof, the contract should be null. *Ratio decidendi*, This provision is elusory, as in the case of a vassal of ward-lands disposing, which cannot save from recognition. But where the contract never took effect, and both parties notwithstanding thereof remained in the natural possession of their own lands; the Lords found otherwise. Durie, Auchinleck, (*Rental*) 15th March 1631, Earl Galloway *contra* burgessees of Wigton.---- A clause in a rental giving power to the rentaller to input and output tenants under him, will not entitle the rentaller to assign; and therefore the assignation of such a rental was found to annul the same, not only as to the assigney, but as to the rentaller himself. Durie, 21st March 1623, Ld. Craigie Wallace *contra* tenants.----- A rental was found not to fall by being assigned, where it bore a power to remove, output and input tenants, and to set sub-tacks, and to give subaltern rights. Durie, 5th March 1629, Ld. Ley *contra* Kirkwood.

THE question occur'd, whether a tack set to a woman, secluding assignies, is void upon her marriage? For the affirmative the authority of Craig was given. *L. 2, Dieg. 10, § 6, Stair, L. 2, T. 9, § 26.* On the other hand it was pled, That here there is no assignation, because a tack secluding assignies falls not under the *jus mariti*. 2do, *Esso* there were, the assignation could only be annulled, but not the tack. See *Stair eodem titulo, § 16, in fine.* Answered, The administration of the tack, as well as of the profits, must, in all events, be in the husband, which is virtually superinducing another tenant; and this is a virtual assignation that cannot be reduced; and therefore nothing is left but to reduce the tack itself. And this is the very reason given by Lord Stair, § 26 above cited. The Lords reduced the tack, January 1734, Sir John Home of Manderston *contra* Margaret Taylor and her husband.

Is marriage such an assignation as to infer the irritancy?

A FEU-CHARTER was reduced, because the feuar had destroyed the woods, trees, houses, &c. and consequently had contraveened the cause of granting the feu, *viz.* for improving barren and waste grounds. Balfour (*Feu*) 12th May 1540, the king *contra* Wardrop.---- In an action for voidance of a tack, upon this ground, That the woods, which the tackfman had expressly bound himself to take care of, were neglected and destroyed. Answered, This is not a statutory irritancy, nor made an irritancy by the tack, and therefore can only infer an action for damages, which the Lords found relevant. 23d January 1729, Duke of Roxburgh *contra* Ker.----- An exception sustained against a removing from a house and yards, upon a rental, constituting the defender kindly tenant thereof, altho' it was alledged that the house and yards had fallen into decay by the defender's neglect, which ought to irritate his rental. Durie, 29th January 1628, Duke of Lennox *contra* Houstoun.

If negligence in preserving the subject infer an irritancy?

Irritancy is not a voidance of the right, making it voidable only. A TACK fought to be reduced, *propter non solutum canonem* by the space of many years, will not be reduced from the time of the first failzie, *sed tantum a tempore litis motæ*. Haddington, 5th March 1611, Seaton *contra* Seaton.

Irritancy of *non solutum canonem*, how far effectual against third parties? A FEU being taken to a man and his wife in conjunct-fee, and after the man's decease, she failing for two years to pay the duty, the feu charter was found not reducible, except as to her liferent, in prejudice of the heir. Balfour, (*Feu*) 5th April 1557, Macon *contra* Macon. Hope, (*Clause irritant*) 22d December 1620, Ld. Kilbirny *contra* Crawford. --- Three persons being bound in a tack (having a clause irritant, in case two years should run in the third) one of whom was to enjoy during life, and the other two thereafter till the expiration of the tack; the liferenter failing one year, and the two others another, notwithstanding that *mora sua unicuique nocere tantum debet*, the Lords found, That the tack was irritated by this failzie as to them all. Colvil, March 1587, Ld. Glasford *contra* tenants.

If irritancy takes place where the condition becomes imprestible? LANDS being mortified to a convent, on condition of saying so many masses yearly for the soul of the donor and his predecessors, and in case of failzie to return to him; 'twas found, That notwithstanding such masses were prohibited by law, (so that *per eos non stetit* that they were not said) and altho' all such lands were by act of parliament annexed to the crown, yet the irritancy took place upon their failzure. Colvil, June 1592, Cockburn *contra* the king.

Irritancy when purgeable? and, *Imo*, *Pactum legis commissoria in pignoris*. --- A wadset being granted under reversion, and upon provision, That if, upon requisition, the principal sum and bygones were not paid, the reversion should expire; requisition being made, and the same not obtempered in the terms of the contract, this *mora* was found not purgeable, altho' the money was offered at the bar. Haddington, 19th February 1611, Ld. Barskeoch *contra* Ld. Garthland. --- A wadset being in the contract declared irredeemable, if not redeemed upon a premonition of ninescore days before the term; the said clause irritant was sustained, altho' *pactum legis commissoria in pignoris* be rejected by the common law. And here the Lords refused to assign a day to the defender to purge, because the requisition was on so great a number of days, and the defender offered not instantly to consign the sum at the bar. Durie, 19th July 1625, Nairne *contra* Napier. --- Irritancy of a reversion of lands given in wadset, incurred by not payment of the yearly annualrent, was found not purgeable; but the Lords ordained some to deal with the pursuer to consent to the purgation, if the whole principal and annualrents were paid at the next term. Durie, 7th February 1628, Pringle *contra* Ker. --- Provision being made in a bond of borrowed money, that a reversion contained in another security should expire, if the said borrowed money were not paid at the time appointed; the Lords found, That seeing the borrower died before the term of payment, and that there were only two months run since the said term, the failzie was purgeable, notwithstanding the act of federunt 27th November 1592. Durie, 19th March 1631, Scot *contra* Dickson. --- A person having borrowed money, granted a security to the creditor, by disposing lands in the form of an absolute disposition; taking

taking at the same time a backbond, declaring, that the lands should be redeemable within a certain limited space, by the payment of the money; redemption was found competent at any time before declarator, this being a *pactum legis commissoriae in pignoribus*. Durie, 8th July 1636, Cleghorn *contra* Fergusson.----A wadset was granted, with a clause irritant, bearing, That if the reverser did not put the wadsetter in possession of the whole tenement within a limited time, the reversion should *eo ipso* expire. It was argued here, That albeit the Lords are in use to suffer parties, incurring irritancies thro' necessity or perhaps inadvertency, to purge the same, this cannot be extended to a wilful failzie, where the reverser obstinately refuses to remove, or put the wadsetter in possession. The reverser was allowed to purge the failzie, by possessing the wadsetter and paying damages. Stair, 25th November 1662, Sawyer *contra* Rutherford.----Clauses irritant in wadsets purgeable before declarator. Stair, 1st February 1667, Earl of Tullibardine *contra* Murray.--- In a sale for a competent price where the purchaser has no power to require his money, the lands are not redeemable but within the time, and on the terms in the reversion. Stair, 17th January 1679, Beatson *contra* Harrower.----Lands being sold for an adequate price to a party who was not *ab ante* creditor, a backbond of the same date, obliging the purchaser to denude upon repayment of the price within a limited time, was found not purgeable. Dalrymple, 4th November 1718, Cutler *contra* Malcolm.----A party selling lands, and getting a backbond of reversion, bearing, That a certain sum was paid, and that if the seller did not redeem by such a day, the lands should be irredeemable, upon the purchaser's paying such a further sum; both which together were declared to be the adequate price of the lands; an offer being made, and a declarator of redemption raised, and the question arising, Whether this was a wadset or a conditional sale? the Lords found it yet purgeable; but that the purchaser might have no trouble, they declared, that if he were not paid within three weeks, the land should be his, and that there must be no retention on pretence of causing him compt and reckon for his intromissions with the rents of the lands, the purchaser finding caution to pay what the pursuer should afterwards instruct against him; since otherwise the pursuer might keep up his money, and delay him with a tedious compt and reckoning. Fountainhall, 23d February 1699, Kintore *contra* Ramsay.----A creditor who had an expired legal, entered into an agreement with his debtor, restricting his adjudication to a lower sum, and granting a reversion for six years, with this express clause, That if the restricted sum was not paid within that time, the reversion should *ipso facto* expire, and the lands belong to the creditor upon payment of a certain further sum, the agreed upon worth of the reversion; the Lords found, this was not *pactum legis commissoriae in pignoribus*, and that the irritancy was not purgeable by payment of the restricted sum after the reversion was expired. Fountainhall, 20th July 1697, Marquis of Athole *contra* Campbell of Glenlyon.----The Lords sustained redemption of lands sold, several years after elapsing of the time prefixed for using redemption by a backbond of reversion. Forbes, 15th February 1706, Young and her husband *contra* Craicks.----Lands being disposed irredeemably, but the purchaser giving the seller a bond of reversion, That upon payment of such a sum betwixt and such a term, he should renounce the lands, otherwise they were to

be his in property, on payment of a certain further sum to the seller; the lands not being redeemed at the time prefixed, but the purchaser still continuing to possess; the Lords, many years thereafter, found them still redeemable, in a declarator of redemption and extinction, not at the instance of the disponent himself, but of the purchaser of his estate at a judicial roup. Fountainhall, 27th February 1706, Colonel Erskine *contra* Hamilton, ---- A man having sold land, and then taking a declaration from the purchaser, That he the seller should have liberty, within two or three years after his son's return from abroad, (whose inclinations touching the sale he was desirous to know) to redeem the lands, by paying the money then given as the price thereof; and the son having shortly thereafter returned, but for four years that he lived never having signified his dissent; and after his death, the father raising a declarator of redemption, the Lords found, That the order not being used within the three years allowed for that end, the lands were not now redeemable, in respect the backbond was granted several months after the disposition, and so not *pars contractus*. Forbes, 28th, Fountainhall, 29th July 1709, Stewart *contra* Stewart.

2do, Irritancy
ob non solutum
canonem.

IN a declarator of irritancy against a feuer, for suffering two years feu-duties to remain unpaid, it was found, That if the declarator proceeded on act 250, parl. 1597, the irritancy was purgeable by payment at the bar; but that it was not purgeable, if the irritancy was pactioned in the feu-right. Stair, 1st December 1664, Earl Sutherland *contra* Gordon. ---- Accordingly the conventional irritancy found not purgeable. Colvil, January 1586, prior of Pluscarden *contra* sheriff of Murray. ---- In the like case, the defender's offer to purge at the bar, was not admitted, unless he could give some good excuse for his neglect. Stair, 13th February 1666, Ld. Wedderburn *contra* Wardlaw. ---- The same rule is followed where the conventional irritancy is contained in a tack. Colvil, December 1586, Hay *contra* Moffat. Haddington, 9th March 1611, Seaton *contra* Seaton. Haddington, 16th July 1622, Donaldson *contra* tenants. Stair, Gilmour, 16th February 1665, Hepburn *contra* Nisbet. Stair, 26th July 1678, Pourie *contra* Hunter. ---- But if the tacksmen has a probable ground of ignorance, tho' it be *ignorantia juris*, he is admitted to purge at the bar, upon payment of the whole tack-duty and damages. Stair, Gosford, 14th July 1675, college of Aberdeen *contra* Earl Northesk. ---- The tacksmen was allowed to purge at the bar, where it was pactioned that the tack should be null upon failure of payment of the tack-duty for a single year. Colvil, March 1587, bishop of Orkney *contra* Sinclair. Spotiswood, (*Removing*) 4th July 1628, Ld. Saughy *contra* tenants. ---- A superior pursuing a declarator of a conventional irritancy against the creditors on his vassal's estate *ob non solutum canonem*, which irritancy was incurred before the vassal's death; the Lords found it still purgeable, tho' the irritancy was ingross'd in the title deeds, and so behoved to be known to the creditors. Fountainhall, 23d March 1686, Riccarton Drummond *contra* creditors of Grange Hamilton. ---- The statutory irritancy of a feu *ob non solutum canonem* found not purgeable, the offer of paying the bygone feu-duties not having been made till long after intenting of the cause. Haddington, 7th June 1605, Wardlaw *contra* Hepburn. ---- The Lords sustained a declarator for finding a tack null *ob non solutum canonem*, altho'

tho' the tack wanted a clause irritant, unless the tacksmen would purge by payment of the tack-duty betwixt and a certain day, and find caution for payment thereof in time coming. Home, November 1682, *Phin contra Phin*. ---- A legal irritancy of a tack *ob non solutum canonem*, found purgeable at the bar, or before extracting, by paying the bygone tack-duties. Fountainhall, 29th November 1683, *Dick contra* . 23d January 1729, Duke of Roxburgh *contra Ker*.

A CLAUSE in a feu-charter, obliging the heir to enter within year and day of his predecessor's death, under the pain of losing the feu, found purgeable before declarator. Fountainhall, 15th December 1693, Baillie of Jervieswood *contra* town of Lanark. ---- A party being rentalled with this provision, That if he made over his right to any other person without his master's consent, he should lose his rental *ipso facto*, without further process; nevertheless in a removing the Lords found, That the pursuer behoved to obtain a declarator of irritancy before the defender could be decerned to remove. Spotiswood, (Removing) Maitland, 22d January 1566, abbot of Kilwinning *contra* . ---- A tacksmen having granted a verbal sublet for a year, a declarator of irritancy intended after the subtenant was removed, libelling upon a clause in the tack, that the same should be *ipso facto* null upon assigning or subletting, was not sustained, the irritancy, as said is, being purged before intending declarator. Fountainhall, 11th December 1708, Forsyth *contra* Johnston and Kennedy.

3to, Other irritancies in feus, tacks and rentals,

A LADY having granted a renunciation of her liferent-right in favours of her son, upon his becoming bound to relieve her of her debts betwixt and a day certain, and, by a posterior deed, it being declared, that if the same were not performed at the day, the renunciation should be void *ipso facto*; this not being a penal irritancy was found not purgeable. Stair, Gosford, 10th December 1672, Lady Cultequhey *contra* Ld. Abercainry ---- In a contract betwixt a liferentrix and her son, she sells and dispones her liferent to him, and he becomes bound to pay her a certain sum less than the liferent, at two terms in the year, with annuallrent for each moiety from the terms of payment; and there is this clause, *That in case the son should fail in punctual payment of the said annuity, at most within a month after each term, then the liferentrix should have full and free recourse to her former right above disponed*; the Lords found this irritancy not purgeable. 12th January 1727, Burnet *contra* Ker. ---- A lady having restricted her liferent annuity in favours of the heir, with this provision, That if the restricted sum were not duly paid by a day, she might insist for her full annuity, and the restriction be null; and the heir, after making punctual payment for some years, having fail'd, and she having adjudged for her full annuities since the date of her right, the Lords sustained the adjudication for the full annuities since the failzie, but not for proceedings; and found, that the failzie was not purgeable. Home,

4to, Conventional irritancies in bargains and contracts.

November 1681, Pearson *contra* Nisbet. ---- In the like case, the Lords found the failzie purgeable by the heir's creditors, but declared, That in case the irritancy were thereafter incurred, they should not be indulged to purge a second time. Home, November 1686, Nisbet *contra* creditors of Dryburgh. ---- One having restricted an alimentary provision from 200 merks to L. 50 yearly, on condition of thankful payment; and the debtor having notwithstanding failed, the Lords considered, That any single failzie ought to have

no further effect than for that year's aliment, and upon this *medium* decerned the full 200 merks for the bygone year; and in time coming found the same also due, unless the debtor also paid the restricted sum within eight days after each term. Fountainhall, 28th June 1694, Dewar *contra* Learmont. ---- A creditor having transacted with his debtor, and accepted of a lesser sum for his claim, under this condition, that if the money was not punctually paid at a certain term, the creditor was to recur to his former right; and the term being elapsed without offer of payment, the Lords found the same yet purgeable. Gilmour, 8th January 1663, Gordon *contra* Ld. Leys.---- The like, where a party transacted an apprising with his debtor. But here the party seeking to purge was not the debtor, but a co-appriiser. Fountainhall, 21st December 1707, Earl Southesk *contra* Arnot. ---- The like where the debtor himself was the party who offered to purge. Bruce, 27th November 1716, Watson *contra* Hamilton. ---- A contract containing an irritancy upon non-performance, was found not purgeable, not being penal. Stair, 20th February 1680, Jamieson *contra* Waugh. Bruce, 14th December 1714, and 21st January 1715, Dundas *contra* Murrays. ---- One having contracted some personal debt, tailzied his estate with this irritant clause, *That in case the tailzier should happen to be charged with burning or other diligence done against him, that the heirs of tailzie must relieve him thereof, within six months after intimation thereof, otherwise to amit and lose their right*; the irritancy being incurred, the publick, by forfeiture, coming in place of the heir of tailzie, it was argued, That the design of this clause was nothing else, but to relieve the tailzier of his personal debt, and here the publick was ready to purge the irritancy, and answer to the tailzier for all damage sustained; the Lords found the irritancy not purgeable. Grierison of Lag *contra* his eldest son and officers of state. ---- The Earl of Dunfermling had a commission from the crown, after the restoration, to call to an account the collectors, who, during the usurpation, had intromitted with the publick money, and to uplift and discharge; in pursuance of this power he made a transaction with Gray of Hayston collector of Forfar, giving him a discharge, upon receiving some part of 30,000 merks in ready money, and bonds for the rest; he also gave Hayston an obligation to obtain a ratification from the crown of the discharge, and a remission to be delivered betwixt and a certain day, to the effect the same might be expedite through the seals; or otherwise, if he prevail'd not in procuring thereof, he was obliged to pay back the money then received, and deliver up the bonds, and each party was to be again in his own place. The Earl having failed at the day to procure the ratification and remission, the question arose, if it was yet competent? And it was pled, That Hayston never suffered any thing by the want of these writs, nor could he now suffer; however they were now ready to implement: The Lords found the resolute clause in the obligation was no penal irritancy, and therefore not purgeable upon performance after elapsing of the day. 1st January 1725, Stirling *contra* Gray. ---- Irritancies in tailzies are not purgeable. Home, 1st February 1726, Stewart *contra* Denholm. ---- A party having taken a tack of his own tithes, and given bond for a grassum, upon receiving a backbond, with this quality, *That if against a certain term he produced a better right to his own tithes than the setter had, the bond should*

should be null, was allowed about three years after elapsing of the term, in suspension of a charge on the bond, to produce a preferable right, the irritancy not being declared, seeing this was a penal irritancy. Forbes, 8th, Fountainhall, 9th January 1708, Cochran *contra* Lord Bargeny. ----- A party being infest in an yearly annuity, for the liberty of a high-way through her ground, with this quality, That if the granter could produce any prior agreement by a certain day, containing a less sum than that now agreed upon, then the granter of the high-way should restrict herself thereto; and the said day being elapsed, the Lords thought, 'That altho' the time limited for producing any restriction was elapsed, yet the failzie was still purgeable, and if they had any such paper, it would be yet receivable; the taking advantage of such penal irritancies being odious in law. Fountainhall, 21st December 1709, Dutchess of Hamilton *contra* Fairholm.

THE Lords found a back-tack during the not redemption of an annualrent containing a clause irritant, in case of not payment of the duty, to be null, in respect of non-payment at the term set down in the contract, altho' the tacksmen had made real offer, *debito tempore*, because they had not consigned the money. Haddington, 3d June 1595, Bishop of Dunkeld *contra* Ld. Ardrross. --- A feu being granted with a clause irritant, it was found not sufficient to offer payment to the procurator making requisition, but that the clause irritant was incurred, unless payment or offer had been made to the superior or his chamberlain. Haddington, 18th July 1610, Lord Torphichen *contra* Ld. Pitfoddels. --- A provision, that a reversion should expire in a certain time, if the reverser did not offer the money, was found sufficiently interrupted by an offer with consignment. Durie, 20th March 1627, Johnston *contra* Ld. Herries. --- An offer *debito tempore*, tho' without consignment, was found relevant to purge a conventional clause irritant incurred, *ob non solutum canonem*, at the time of the dispute, the money being produced at the bar, tho' such an offer, without consignment, would not stop the course of annualrent. Fountainhall, Stair, 26th July 1678, Ld. Powrie *contra* Hunter. --- The like. Maitland, 4th May 1556, Bishop of Murray *contra* Ld. Kinfauns.

Offer of payment, if it stops incurring the irritancy?

IRRITANCY upon marrying without consent. See Condition.

GROUND of compensation, if it will prevent the irritancy from taking place? See Compensation.

TO whom competent to plead the benefit of an irritancy. See Justitii. See Personal and Transmissible.

JURISDICTION.

FOUND, That an arrestment upon a bailie's precept, being executed *extra territorium*, is null, altho' the debtor live within the bailiary. Stair, Gosford, 5th December 1671, Miller *contra* Crawford. Judge what authority he has *extra territorium*.

ford. --- A woman having restricted her jointure, and confirmed it by an oath before a judge, that she should never come in the contrary; and now alledging that the oath was administered *a judice non competente*, viz. the sheriff of Edinburgh in the Abbey, which is *extra ejus territorium*; the Lords found, That it was *actus voluntariæ jurisdictionis*, and needed not be *pro tribunali*, and that any judgment was competent for that. Fountainhall, 3d February 1688, Cochran *contra* Lady Bathgate.

Parts of a barony in different shires.

FOUND, That where lands are united and annexed to other parts of a barony lying in another shire, yet the tenants, vassals, &c. must give suit in presence at the head-courts of that shire, within which they are locally situated. Maitland, 24th February 1552, Ld. Calder *contra* sheriff of Nairn.

Jurisdiction how dismembered?

A VASSAL, tho' infeft *cum curiis*, is not exempted from his superior's courts. This clause gives him power to hold courts upon his own tenants for his farms, or wrong done among themselves; which, at the same time, is not privative of the superior's jurisdiction; and therefore if the vassal himself do wrong, or commit blood, he may be conven'd in the superior's court, notwithstanding of the said clause. Durie, 3d March 1630, Lord Lorn *contra* Ld. of Panholes. --- A burgh of regality has no jurisdiction exclusive of the bailie of regality, within whose bounds the burgh lies; but betwixt them there is *locus preventionis*: For the burgh's jurisdiction, being granted by the lord of regality, is to be understood cumulative, not privative; as is always understood in grants of jurisdiction to vassals, which a burgh is. Stair, 14th, Dirleton, 15th January 1668, bailie of the regality of Killimuir *contra* burgh of Killimuir. --- A baron having granted a charter to his burgh of barony, with power to them to chuse their own bailies, whom he appoints and declares to be his baron-bailies within the bounds of the burgh; the Lords found, That by this grant no more was intended than a subordinate jurisdiction, such as is competent to vassals, which the incorporation of the burgh is, consistent always with the accumulative jurisdiction in the superior. 7th December 1734, Earl Wigton *contra* town of Kirkintulloch. --- The erection of a burgh-royal within a bailiary, excludes not the bailiary of its jurisdiction and casualties; and the case is not here alike, as where a barony is constituted within an heretable sheriffship, because the casualties of sheriffship belong to the king, but the casualties of a bailiary belong to the baillie *proprio jure*, which cannot be prejudged by any posterior grant. Stair, 27th February 1666, Lord Colvil *contra* town of Culrofs.

AN heretable bailie of regality having disposed lands lying within the regality to be holden of the king, with all right the disponent had thereto; this was found not to exempt the disponees from the jurisdiction of the regality. Stair, 15th February 1673, Ld. Craigievar *contra* vassals of Lindores. --- The like. 20th February 1733, Hay of Strowie *contra* creditors of Simpson.

Effect of a deputation.

AN heretable bailie having first given a deputation, extending over the lands belonging to the depute himself, as well as several other lands in the neighbourhood, and thereafter a general deputation to another over

over the whole regality, in a question betwixt the two deutes, the first deute was found exempted from suit and compearance, either at head-courts or other courts held by the other deute. Durie, 7th March 1622, *Ld. Clunie contra Ld. Boquhin*.

IN a suspension of an inferior judge's decret for a bloodwit, because the fact was referred to the party's oath without any inquest, the Lords sustained the decret, seeing the party was personally present, and not pursued to lose either life or limb, but only for a pecuniary unlaw. And this, our author says, was then usually done before the privy council. Durie, 13th February 1634, the bailie of Melrofs *contra* Darling.--- The like. Durie, 30th January 1622, Stewart of the Merse *contra* Ld. Westnisbet.

What cases
must be tried
by an inquest,

Prorogation of jurisdiction.

A PERSON being summon'd to compear *coram non suo iudice*, the Lords found, That if he did not compear and propone his declinator, the decret pronounced against him must stand good till it be reduced. Colvil, February 1585, Robertson *contra* Dundas.---The contrary was found, and the decret declared *ipso jure* null, where the privy council had decerned in a removing; but here the incompetency was clear. Colvil, July 1586, M'Duff *contra* Doig.

Decret pronounced by an incompetent court.

THE decret of an inferior judge was sustained altho' pronounced in time of vacance without dispensation, because that defence was omitted to be proponed, and the not inserting the dispensation in the decret was found not objectable by the defender, either in suspension or reduction. Auchinleck, (*Decret*) 6th December 1628, Ld. Minto *contra* Maxwell.

Decret pronounced in vacation time, how prorogated?

FOUND, That a sheriff's jurisdiction may be prorogated against a party living without it, by his compearing and pleading, without objecting to the jurisdiction, and that he is thereby barr'd from quarrelling the decret as *a non suo iudice*. Durie, 23d February 1627, Service *contra* Charlmers.

Prorogatio de loco in locum.

No inferior judges in this kingdom have power to decide in an action of contravention of lawborrows, tho' they may cause parties find caution of lawborrows in their courts; and if they proceed and give process and sentence of contravention, tho' against a defender compearing, the samen will be null by way of exception. Haddington, 6th July 1611, Kennedy *contra* Kennedy.---A decret of removing being obtained before a sheriff, at the instance of a master against the tenant, for not payment of his tack-duty, and finding caution for payment thereof in time coming; the Lords found, That a sheriff was not judge competent in such extraordinary removings, even tho' the defender did compear, and did not propound that defence, and so seem'd to homologate the sheriff's jurisdiction, and therefore found the decret null, Falconer, 22d December 1681, Home, March 1682, Bethune *contra* his tenants.---The Lords re-

De causa in causam.

poned a party against a decret of the justices of the peace, pronounced in a compt and reckoning, in vacation-time without a dispensation, and decerning him to pay *L. 8 Sterl.* to the pursuer, as his share of *L. 100* due to the partners of a manufactory, altho' the defender had compeared, proponed payment, and suffered the term to be circumduced against him for not proving, and for not deponing upon the verity of the libel, referred to his oath. Forbes, 2d July 1712, Lord Pitmedden *contra* Douglas.

Prorogation
of a commissary
decret above
L. 40.

AN action for debt referred to the oath of the debtor, especially if it proceed upon a contract ordained to be registred in the books of the commissariat, may lawfully be pursued before the commissary *ratione juramenti*. Haddington, 4th July 1611, *contra* .----
A consent to registrate in the commissar books express'd in the deed, is understood a prorogation of the commissar's jurisdiction, as to all processes founded upon the deed. Durie, 27th March 1627, Irvine *contra* Young. ---- The contrary. Durie, 28th November 1621, Ld. Greenock *contra* .---- Tho' a commissary decern in a sum, exceeding the injunctions given to the commissaries 20th February 1666, yet the sentence is valid, unless the same had been objected upon compearance. Here the decret was in absence. Stair, 25th June 1668, Black *contra* Scot.

Prorogation
of the jurisdic-
tion of a
judge against
whom there
lies a personal
objection.

A DECRET of deprivation pronounced by a bishop against a prebendary, was sustained, tho' quarrelled by suspension, upon this ground, That the bishop was rebel at the time of pronouncing, in regard that objection was not proponed before the sentence, *l. Barbarius Philippus, 3 pand. de officio prætorum*. Durie, 29th January 1629, Kellie *contra* Winram.

Prorogation
of the jurisdic-
tion of the
court of session,
in causes where
they are not
judges at the
first instance.

THO' the judge-admiral has a privative jurisdiction, at the first instance, in maritim causes, yet registration of a charter-party in the books of session was sustained, in virtue of the consent to registrate there, by which the jurisdiction of the court of session was prorogated. Marcus, (*Suspension*) February 1682, Brown *contra* Burnet.

Proponing
other defences
after a declina-
tor is repelled,
no prorogati-
on.

A PARTY having first proponed declinator of an inferior judge, and that being repelled, having gone on to propone other defences; the Lords found, That this was not passing from the declinator of the court as incompetent. Fountainhall, 29th July 1696, Schaw *contra* Buchanan.

Prevention in cumulative jurisdictions.

IN a competition betwixt the king's vassal, tho' no baron, and the steward of the stewartry, both having unlawed a person for a bloodwit, the Lords preferred the king's vassal, in respect of his prevention. Durie, 30th June 1622, Stewart of the Merse *contra* Ld. Westnisbet. ---- Prevention by citation is not sufficient, if the judge does not use diligence to bring it to a sentence; and therefore, in a bloodwit, tho' the bailie first cited, he delaying to proceed, the sheriff's sentence was sustained. Gosford, Stair, 9th November 1672, Scot *contra* Riddel. ---- Tho' the procurator-fiscal of one court has first attached the criminal

minal by prevention, that hinders not the private party to apply to any other court for his reparation. Stair, *ibid.* Gosford, 1st July 1673, Fork *contra* Fife.

Jurisdiction of the court of session.

OF old, the Lords jurisdiction in maritim affairs was cumulative with that of the admiral; only in such cases they allowed him to sit, and have his vote with them. Sinclair, 9th March 1543, Lord Bothwell *contra* Flemings. To what causes the jurisdiction extends.

THE Lords found themselves competent judges in a process of battery against a churchman. Sinclair, March 1548, abbot of Paisly *contra* provost of St. Giles. — Before the reformation the Lords were never in use to grant letters of lawbarrows against a priest, but still remitted him to his ordinary. Sinclair, 28th June 1542, Fenton and Douglas *contra* Sir John Johnston priest. — The Lords of session are judges competent in spiritual causes, even in the first instance, when the consistorial jurisdiction is stopped by civil wars, or otherwise. Balfour, (*Session*) 19th December 1560, Chalmers *contra* Lumisden. — The Lords advocated a cause from the high commission for plantation of kirks, in an action concerning the title of a benefice contentious betwixt a person presented by the king, and another presented by the prior of Eccles. Haddington, 22d February 1623, *contra*

. — The right to a stipend is a civil right, and therefore the court of session has a power to cognosce and determine upon the legality of the admission of ministers, *ad hunc effectum*, whether the person admitted shall have right to the stipend or not. 14th February 1735, Moncreif of Redie *contra* Mr. Patrick Maxton.

AN error of an inquest *in civilibus*, since the erection of the college of justice, is competent before the Lords to be proved by witnesses, and not referred to a great inquest. Haddington, 14th July 1610, Ld. Wedderburn *contra* Nisbet.

A GIFT of forfeiture may be declared before the court of session, tho' it was contended, that the Lords of session are not competent judges to any nullity or informality of a criminal process. Harcus, (*Forfeiture*) March 1683, Lord Livingston *contra* Gordon of Torphichen.

THE Lords were found to be judges competent in a contravention of lawbarrows, altho' the deeds were criminally qualified, and altho' there was no previous criminal process. Colvil, March 1580, *contra* Lord Ross.

THE Lords sustained themselves judges competent to a contravention of the act of parliament against usury. Haddington, 2d March 1611, officers of state *contra* Coutie and others.

THE Lords of session are not judges competent in purpresture, but the justiciary only. Balfour, (*Purpresture*) 10th November 1597, Cockburn *contra* Ramsay.

ALTHO' the Lords of session cannot judge in criminal matters, yet their Lordships found, That if a party be criminally pursued before the criminal judge, they are judges competent to enquire whether the said judge has proceeded orderly; and if he have not, or have acted unjustly, their Lordships may punish him for the same, and

reduce the process. Balfour, (*Session*) 5th December 1500, Earl Cassils *contra* justice-general and his deputies. 2d April 1517, Earl Lenox *contra* the king.

IN a pursuit at the instance of private burghers, against the magistrates of a burgh, for malversation, &c. the magistrates declining the Lords, because of the act 29, parl. 1693, mentioning a commission to be named by the king; yet the Lords found themselves judges competent to all such processes. Fountainhall, 8th July 1707, Ainsly and others *contra* magistrates of Jedburgh.

THE Lords did, *causa cognita*, repute a procurator before an inferior court, who had been suspended by the judge. Haddington, 28th November 1609, Russel supplicant.

UPON a widow's petition to be allowed to intromet with the crop and goods belonging to the defunct, without hazard of vitious intromission; the Lords refused to meddle therein, but remitted her to the commissary of the place. Dirleton, 13th January 1675, *contra*

Causes in
which they
cannot judge
at the first in-
stance.

THE reason of advocacy of a brieve of perambulation being, That the raiser of the brieve was steward of the stewartry where the lands lay, and the brieve was directed to his own deputy; the Lords repelled the reason of advocacy, and remitted the cause back to the steward-deputy; because the Lords are not judges to perambulations and molestations in the first instance, such causes being best discuss'd on the ground of the lands by a sworn inquest of neighbouring gentlemen, where the judge, witnesses and inquest can visit and perambulate the marches, which the Lords cannot possibly do at Edinburgh, but must remit it *ad probos & fideles homines patriæ*. Fountainhall, 4th December 1711, Marquis of Annandale *contra* Sir Patrick Maxwell of Sprinkell. ---- A party being convened before the sheriff-court, for an insult and riot committed upon the person of a sheriff-officer in the execution of his office; and the defender having obtained an advocacy, the Lords, upon a summar application by the sheriff, found they were not judges competent to riots, batteries, or bloodwits, in the first instance, but only when they came in before them by suspension or reduction; and therefore recalled the advocacy as illegal and irregular. Fountainhall, 4th March 1707, Alves *contra* Maxwell of Dalwinton. ---- One's service being quarrelled by reduction on the head of bastardy, the Lords sustained themselves judges in the action; because it is only when the service is stop'd by the alledgeance of bastardy, that the trial thereof is remitted to the commissary to be finished in six months. Durie, 23d July 1630, Pitligo *contra* Davidson. ---- Tho' by the 6th act, parl. 1609, the commissaries of Edinburgh are appointed sole judges to the reduction of inferior commissaries decreets; yet the Lords advocated *ob contingentiam causæ* the reduction of a decret-dative *ad omiffa*, pronounced by the commissary of Stirling; in respect some of the sums omitted were pursued before the session by the obtainer of the dative. Marcus, (*Advocations and Advocates*) July 1687, Margaret Callender *contra* John Boway. ---- In a process of aliment at a woman's instance against her alledged husband, the defender denying the marriage, and the pursuer offering to prove the same; tho' this was an incidental question, the Lords refused to sustain themselves judges, but stop'd the process of aliment until the pur-
suer

fuer should instruct her marriage before the commissaries. Fountainhall, 29th December 1710, Forbes, 25th January 1711, Cameron *contra* Innes.

A DECLARATOR of nullity of right cannot be pursued before an inferior court, altho' the party so oblige himself by contract. Hope, (Contract) 11th November 1618, *contra*. ---- An action for proving a tenor, not competent before an inferior judge. Stair, 28th January 1663, Ld. Balnagoun *contra* M'Kenzie. ---- Declarators of ward, nonentry, &c. must be pursued before the session, not the exchequer, by a letter from the king. Stair, 14th June 1665. ---- The Lords advocated a cause, and found themselves the only judges competent, where magistrates of a burgh-royal, that had a right of sheriffship within itself, were pursued before the sheriff of the shire, upon a bond only granted as representing the town. Gosford, 26th January 1670, Wilson *contra* town of Perth. ---- The Lords of session are the only judges competent in removings by the *remedium extraordinarium*, against tacksmen who have years of their tack to run, and are in arrear a full year's rent, *viz.* that they should find caution for bygones and in time coming, or else remove; and sheriffs are not competent to judge in such removings, tho' they be competent to cognosce ordinary removings where there is no standing tack, as is provided by the act 39, parl. 1555. Marcus, (Spuilzie) 15th December 1681, Bethune of Blebo *contra* his tenants. ---- The like, Durie, 23d February 1632, Ld. Jervieswood *contra* Ld. Livingston.

THE Lords of session have not only a power to advocate civil causes to themselves from inferior courts upon the head of iniquity, but also upon any other reasonable cause, such as its being a matter of importance. Durie, 7th July 1630, Lands *contra* Dick. --- Or performing a bargain anent lands. Maitland, 17th February 1567, Ld. Polmaise *contra*. --- Or resolving into a competition upon double rights, tho' intricacy be not alledged. Dirleton, 25th June 1675, *contra*.

AN advocacy being sought of a maritim cause from an inferior admiral, the Lords considering, that the act 16, parl. 1681, discharging such advocations, had extended the admiral's jurisdiction too far, found, it was only meant of pursuits before the high admiral, and not before deputies; who, either on the head of partiality, injustice, or being parties, may be thus stopped; yet the Lords thought, they could not advocate these causes to themselves, but only to the high admiral, as they do with criminal causes; and sometimes they give directions even to the commissaries in divorces, &c. where themselves are not judges in the first instance. Fountainhall, 22d June 1700, *contra* Bruce. --- Competent to the court of session to advocate criminal causes *ad hunc effectum*, to remit them to other more competent unsuspected judges. Durie, 9th January 1629, baron of Brughton *contra* Kincaid. Stair, 21st February 1666, *contra* sheriff of Inverness. --- The court of session advocated a cause for church censure, from before the dean of the Chappel-royal, and remitted the same to the bishop and clergy. Stair, 19th December 1680, M'Clellan *contra* bishop of Dumblain. --- A minister who was pursued before a sheriff as an intruder

truder into a church, having presented a bill of advocation; the Lords advocated the cause to the Lords of his majesty's privy-council, and not to themselves; the competency of judicatories being a point of civil right to be judged of by the Lords only. Fountainhall, 5th June 1696, Alexander *contra* sheriff of Inverness.

If they may
suspend the de-
creets of sove-
reign courts?

FOUND, That the Lords of session cannot suspend a decret of the privy-council, unless the reason of suspension be obedience to the decret. Balfour, (*Session*) 15th June 1545, Touris *contra* Lord Weemyss. 1st April 1546, *inter eosdem*. --- In what is truly criminal as to corporal pains or amercements, in way of punishment, the court of session never suspend the sentences of the court of justiciary; but assythments, being civil, for the damage and interest of the party, pursuable before the session, in such cases they do recognise the sentences of the justiciary. Stair, 16th December 1664, Innes *contra* Forbes. --- But thereafter, the Lords found the justiciary a sovereign court, so as their acts and decreets could not be cognosed by the Lords of session. Falconer, 9th March 1684, Strachan *contra* commissioners of justiciary.

Criminal ju-
risdiction.

IN the case of forgery of a writ, the Lords found, (as was usual) That in the trial of falsehood, they might inflict the particular punishment themselves, where it was within the pain of death, without remitting the party to the justices; but where the crime was capital, that they ought not to meddle therewith, but to remit the party to the justice court. Durie, 14th July 1638, Dunbar *contra* Dunbar. --- The Lords of session may inflict corporal punishments when witnesses prevaricate. Gosford, 6th July 1669, Heirs of line of Towie *contra* Barclay.

Nobiles offici-
um.
Imo, Proof
ex officio.

THE Lords having appointed the witnesses in a bond to be examined, *ex officio*, for trial of the cause of the obligation and debt therein contained, did grant a commission for examining one of the witnesses, who, for age and sickness, was not able to compare before them, notwithstanding the maxim, that *ea quæ sunt ex nobili officio non possunt delegari*. Durie, 16th January 1627, Lundie *contra* Gourlay. --- In a question of fraud, the Lords, *ex officio*, having pronounced an act before answer, they admitted witnesses otherwise exceptionable, with a view to make all manner of expiscation, reserving to themselves at advising what it should operate. Fountainhall, 3d December 1687, Scot *contra* Fowler and Preston.

2do, Supply-
ing omissions
in deeds.

THE Lords, *ex officio*, appointed the place and order of a reversion, no mention being made thereof in the contract. Auchinleck, (*Reversion*) 2d July 1630, Paterfson *contra* Paterfson. --- A man having got decret of adjudication upon a bankrupt estate, but finding that his bond, on which it proceeded, had no liquidate penalty, but only the general clause, *with annualrent and penalty*, without specifying what the penalty should be, which seem'd to be but an omission of the writer, and therefore craving, by bill, That the Lords would supply it, by allowing a fifth part more; the Lords refused the bill, as finding they had no power to supply the defect. Fountainhall, 6th January 1705, Leslie *contra* Ogilvie. --- The principal sum in a bond of provision being payable, with annualrent from such terms after the granter's de-
cease,

cease, as certain trustees therein-mentioned should think fit to appoint, and both the granter and the trustees having deceased without determining the terms of payment; the Lords, in a pursuit for the sum, decerned for the principal sum, and annualrents thereof from the date of the decreet. Forbes, Fountainhall, 21st June 1711, Calder *contra* Middleton.---- A person having tailzied his estate under clauses irritant, but making no definitive settlement what should be the constant jointure of the ladies of the family, nor how much the estate should be burdened with for providing the younger children, but, in place thereof, naming four or five friends, by whose advice and consent these things should be determined, giving their successors the same trust after their decease; the friends having all deceased, without either appointing the said quota, or naming successors to themselves; in a declarator against the next heir of entail, at the instance of him who immediately succeeded the maker of the tailzie, craving that the Lords, *ex nobili officio*; would supply the defect, either by making a new nomination with the same powers as were in the tailzie, or take the nominees powers upon themselves, and determine what should be the quota; there being no contradictor here, the Lords found these powers were not extinguished by the death of the former nominees, but that the same yet remained with their Lordships, yet did not incline to do it by a new nomination and substitution of others, but rather to appoint what should be the quota; and that they might do it the more equally, they ordained a condescendance to be given in what might be a reasonable provision either for wives or for younger children. Fountainhall, 13th July 1699, Hepburn *contra* Countess of Tarras and others.

A TUTOR petitioning for a warrant to set the lands at a less rate than formerly, since the old duty could not be gotten, the Lords, tho' they had granted such warrants to others, thought, upon better consideration, that it was fit to refuse the said bill, seeing, upon such pretences, minors may be wrong'd by their tutors. The author adds a reason, *viz.* That the Lords have only a *jurisdictio contentiosa*, in relation to processes or questions depending betwixt parties, but not a voluntary jurisdiction, nor power in relation to the administration of private estates; and if the tutor's deed in setting pupil's lands were warrantable, the law would secure him, and therefore left him to do as he would be answerable. Dirleton, 25th June 1675, tutor to Ayton's children supplicant.---- Four Protestants and five Romanists being named by a father in his testament to be tutors to his son, and three of them to be a *quorum*, (a Roman catholick being always one) the protestant nominees were authoris'd by the Lords to officiate and act by virtue of the aforesaid nomination, as if the *sine quo non*, and the other Roman catholicks had not been mentioned. Forbes, 3d July 1711, tutors of Niddery supplicants.---- A factor on a burdened estate, representing by petition, That the tenants having been tardy in delivering their farm bear, the price was fallen, so that he could not get the sheriff's fiars for it, and therefore craving warrant to sell it at the best avail as the mercats ruled; the Lords thought it not regular to give him any directions in the matter, but left him to his own method. Fountainhall, 19th June 1701, Mr. Robert Wright supplicant.

*3to, Interpo-
sing authority
to the deeds of
private parties.*

AN heretor unmarried dying, and his immediate younger brother being on a voyage to the Indies, upon a petition given in by some creditors, Power of
naming fa-
ctors.

ditors, craving, That, until the heir's return, a younger brother might be named factor on caution, &c. the Lords demurred, because the estate was not incumbered nor affected by diligence, in which case only, during the ranking of creditors, the Lords use to name factors; yet the case being extraordinary, they interposed their authority to his being factor only for a year, within which time the apparent heir might return, and only to intromet with what befalls to the heir; for as to bygone rents and stocking, these falling under executry, they must apply to the commissaries, and get a warrant to dispose on them, because, where law has provided a remedy, we are not to recur to extraordinary methods. The author here remarks, that in such cases the Lords have varied, sometimes allowing a factor, and at other times refusing, and leaving parties to follow their own way as they think best. Fountainhall, 12th July 1700, Lord Carmichael and others supplicants.---- A party who had a feu-duty payable to him out of some lands, having represented, by bill, That by the heretor's being dead or bankrupt, and by the lands lying two years waste, both he and the king's cels, minister's stipends and other creditors were disappointed, craving therefore a factor to be named, &c. The Lords considered, That if he and other creditors had not adjudged already, they might do it, and then, by their own right and authority, they might put in a factor, therefore refused the petition. Fountainhall, 19th June 1701, Merk of Leidcaffie supplicant.---- The Lords refused to grant warrant or commission to manage the estate and affairs of an heretor who had gone abroad without leaving a factory for that effect, to one who offered caution to hold compt for his intromissions to the absent heretor, and all others concerned. Forbes, 13th July 1708, William Stewart supplicant.

Modification
of prisoners
aliment.

WHERE magistrates collude with prisoners, by appointing them a greater aliment than they are entitled to, the Lords take it upon them to modify the same according to the circumstances of parties. Fountainhall, 28th December 1710, Durham *contra* Glaswell.

Modification
of the fiars.

IN a reduction of the fiars of East-lothian, 1mo, Because of their exorbitancy. 2do, Because not struck by a jury impannelled, according to the prescription of the act of sederunt 21st December 1723. It was objected, There is no reduction competent in the nature of the thing of sheriff fiars, which are nothing else but a return made by the sheriff as the king's officer, into the king's court of exchequer, of what he finds to be the reasonable price for grain that year, which is not matter of jurisdiction at all to be subject to the review of a superior court. The Lords notwithstanding found this matter subject to a review, and sustained themselves judges. December 1725, Lewars *contra* Earl of Haddington and his deputes. Formerly they had found this matter not subject to their review. Forbes, 18th June 1712, brewers supplicants *contra* sheriff of Edinburgh.

Inferior Court.

Jurisdiction.
1mo, With re-
gard to impro-
bations.

ALL inferior judges may judge in improbations of whatsoever writ used by parties, and produced in any process before them, where the improbation is proponed by way of exception or reply, and where the direct manner

manner is extant, but no otherwise, not by way of action, nor at all where the direct manner is not extant; and if they repel any such alledgeance of improbation, the Lords found it iniquity, and a just cause of advocacy. Durie, *ult.* November 1630, Williamson *contra* Cushnie. --- Found, That improbation of executions or writs made use of before inferior courts, cannot be pursued before them after sentence. Hope, (*Commissary*) 28th February 1615, Murray *contra* Hutchefon. Gosford, Stair, Dirleton, 26th January 1677, Cowan *contra* procurator fiscal of Glasgow.

AN inferior judge can sit upon an ejection, Colvil, ber 1586, Home *contra* Paxton.

Novem- 2do, Ejection.

INFERIOR judges may proceed in contraventions of small importance, especially where the same depends upon acts of lawburrows found in their own courts, and where the pain is small. Durie, Haddington, 12th March 1622, Marshall *contra* Blair.

3tio, Contravention.

FOUND, That the provost and bailies of a town (the same with respect to all inferior judges) could not transfer a decret pronounced by the dean of guild against the defender's heir, because they could not execute it, and therefore not transfer it; but found, That any inferior judge may transfer a decret given in his own court, such transferring being but a preparatory step to the execution thereof. Durie, Spotswood, (*Transference*) 21st July 1631, Adamson *contra* Masterton. --- A commissary may be judge in an action of transferring *active* of his own decret. Durie, 18th January 1628, Nasmith *contra* Ruthvens. --- The court before whom the process depends, is the only one competent for transferring, unless the representatives live in another territory, in which case the court of session must transfer. Gosford, 9th January 1674, Denholm *contra* Johnston.

4to, Process of transference.

No inferior judge can unlaw in more than L. 10 Scots for contumacy: This found with respect to a sheriff. Durie, 7th February 1624, Sandilands *contra* Robertson. Durie, 6th December 1628, Crichton *contra* Wilson. --- The like, with respect to a bailie of regality, who cannot unlaw for more than L. 10 for absence from the head-court of a regality. Durie, 22d July 1631, Douglas *contra* Kellie. --- The same with respect to a baron court. Durie, 16th March 1622, Ld. Boquhen *contra* Ld. Clunie. But in case of delicts probable before the court, there is no such restriction. Thus a fine of L. 50 Scots, imposed by a baron, was sustained. Hope, (*Jurisdiction*) 10th January 1621, Baillie *contra* Lord Torphichen. Durie, 17th December 1629, Ld. Lamington *contra* Baillie. --- As also a fine for a bloodwit of L. 100 Scots, imposed by a king's vassal, who was not a baron, was modified only to L. 27. Durie, 30th January 1622, Stewart of the Merse *contra* the Ld. of Westnisbet. --- And a fine for L. 200 Scots, pronounced by a bailie of regality, was sustained. Stair, 30th January 1663, Stewart *contra* Bogle and Matthie.

5to, To what extent can they fine?

THE commissaries cannot be judges in reduction of their own decreets, but only the Lords of session, to whom belongs the reduction of all decreets of inferior judges. Haddington, 29th January 1611, Leyes *contra* Murray. Gosford, 26th January 1677, Cowan *contra* the procurator fiscal of the commissariat of Glasgow. --- Yet commissaries may reduce confirmations of testaments past before themselves. Haddington, 29th January 1611, Leyes *contra* Murray. --- Inferior judges can

6to, Cannot review their own decreets,

summon a party to compare and explain his oath given in the same process. Durie, 23d February 1627, Service *contra* Chalmers.

Vacation
dispensation.

A BARON may pursue his tenants for their farms in his own court in time of vacance, altho' he have no dispensation. Durie, 8th July 1624, Richardson *contra* Hay. ----- Justices of peace cannot hold a court in Christmas vacation, unless for riots. Dalrymple, Bruce, 19th November 1714, Ld. Fullerton *contra* Earl Kilmarnock.

ALL inferior judges keep courts after Michaelmas without dispensation. Stair, Gosford, 30th June 1675, Wardlaw *contra* Wardlaw. ---- The Lords sustained a sheriff's decret, tho' pronounced in time of vacance, without dispensation, because it was given after the head-court at Easter, tho' that head-court fell within the time of vacance, seeing then in effect the time of vacance ceased. Durie, 2d July 1629, Lord Bamff *contra* chamberlain of Boyn.

A PARTY having suspended a decret, because obtained before a sheriff on the 21st August by virtue of a dispensation, whereas the act of federunt 21st July 1696, discharges dispensations to be given beyond the 20th August; the Lords sustained the decret, and repelled the nullity, in respect of the preparative and consequence; but their Lordships were clear to declare all such deeds null in time coming, and called for the clerks to the bills and their deputies, and gave them a sharp rebuke; and declared, that the principal clerks were liable for the escapes of their servants. Forbes, 9th, Fountainhall, 10th January 1711, Ruffel *contra* Miller. ---- The Lords found the decret of an inferior court null, for being pronounced on the 20th March without a dispensation; for the act of federunt does not import a dispensation to all inferior courts to sit till the 20th March *inclusive*, but only that by a dispensation they may sit till then, and no longer. Forbes, 23d July 1713, Honyman *contra* Oliphant.

Execution
of sentences.

A SHERIFF may grant a precept of poinding upon his own decret, and cause the same to be put to execution, without any particular warrant from the Lords of session. Durie, 5th December 1635, Sutor *contra* Cramond. ---- An inferior judge cannot execute any decret pronounced in another court. Durie, 21st July 1631, Adamson *contra* Masterton.

Admiral Court.

Jurisdiction.

A PARTY who was preferred as highest offerer for wines adjudged as prize, and roup'd by order of the admiral, having signed the articles and conditions of sale, whereof this was one, That the person preferred should give bond and sufficient caution to pay the price offered to the clerk of admiralty within a precise time, under a penalty; the Lords sustained the admiral as judge competent in a process at the instance of his procurator-fiscal against the purchaser, for payment of the penalty incurred through his not performing the articles of roup. Forbes, 26th June 1705, Higgins *contra* Brand. ---- The Lords advocated *in jure* a process intended before the admiral, at the instance of the conservator, against a factor abroad, for money expended in negotiating his affairs in Holland, as not being maritim. Forbes, Fountainhall,

28th June 1705, Kennedy *contra* Gordon. ---- The admiral not competent to judge in an action for exhibition of bonds granted to a factor in Scotland, for the price of goods sent to him from abroad to be sold here, as not being a seafaring cause. Forbes, 28th March 1707, Graham *contra* Pyper. ---- A party having brought his cause before the admiral, offered a bill of advocacy upon iniquity, insisting, That tho' by the act 16, parl. 1681, causes properly maritim cannot be advocated, the present case is nowise maritim; and that in such cases where the judge comes to be competent by prorogation only, the court has no extraordinary privileges. The Lords thought, he who elected a judge took him with all the qualifications and extent of power given by law; and advocations for iniquity being prohibited by the statute, they refused the bill of advocacy. Fountainhall, 24th January 1699, Cairns *contra* Jackson. ---- The contrary formerly found, and the advocacy sustained. Fountainhall, 21st February 1694, Rowand *contra* Darling.

AGAINST an arrestment founded upon an inland bill, it being objected, That it was laid on in virtue of a precept by the judge-admiral, who is no way competent in civil debts which are not maritim; it was answered, That nothing is more ordinary than to pursue for bills of exchange before the admiral, and to annul such arrestments would endanger the rights and properties of the lieges. The Lords sustained the arrestment. Fountainhall, 19th July 1706, Anderson *contra* Turnbull.

BEFORE the act 16, parl. 1681, it was not competent to the high admiral to reduce the decreets of depute admirals. Stair, 19th June 1672, Sir John Urquhart *contra* Johnston.

Baron Court.

A BARON in his own court may liquidate the price of farms resting by his tenants, and may poind for the same. Balfour, (*Baron in civilibus*, Jurisdiction Court) 24th November 1570, Kid *contra* Haliburton. ---- The Lords turned a baron's decretet into a libel, tho' given against his own tenant; but it was for a great sum of damages, because of the tenant's riving out greens and swards of the land, burning and wasting moss, &c. Durie, *penult.* November 1632, Ld. Haddo *contra* Johnston. ---- Baron courts determine in processes for cutting of wood, fishing in close time, killing caperkellies, and other such penal statutes. Stair, 3d February 1674, Ld. of Strowan *contra* Cameron. ---- A proprietor who has a right of holding courts, may pursue before his own bailie for teinds to which he has a right, which was found, tho' the teinds were not liquidated by a valuation, but the fifth part of the rent pursued for; which the defender pleaded he could not do, having only a right to pursue for the mails and duties, or other rents already liquidated. Stair, 18th June 1674, Walker *contra* Brown.

NONE but the king's immediate vassals can judge in matters of blood, or levy bloodwits; and this power being *merum imperium*, cannot be delegated. Colvil, 16th December 1579, Ld. Tough *contra* Ld. Strathurd. --- A baron court may be holden for blood at any place in the barony, as well as at the head court place. Nicolson, (*Baron Court*, *In criminalibus*)

Court) 11th January 1623, Innes *contra* Grant. --- A baron or his bailie may secure any person that commits a riot, blood or oppression upon any of his tenants, without necessity of a warrant from superior powers, which he may do at any time before the party go forth of the barony. Hope, (*Jurisdiction*) 10th January 1621, Baillie *contra* Lord Torphichen. --- A baron pursuing his tenant in his own court for breaking of his arrestment, and convicting him thereof, and therefore decerning him to fine all tacks and goods which he had within his barony; the Lords will allow of the decreet, and grant letters conform thereto. Haddington, July 1611, Currier *contra*

Jurisdiction
belonging to
proprietars
who are not
king's vassals.

A MAN may pursue in his own court for nonentry of lands holden of himself. Maitland, 30th July 1554, Lord Angus *contra* Ld. Fernieherst. --- Any master of the ground having first liquidated the bygone farms due by his tenant, may, by his own officers created in court, poid for the same. Sinclair, 24th July 1541, *contra*

Jurisdiction
of these who
are infest *cum*
curiis.

THE Lords refused to sustain a decreet obtained by a master against his tenant before his own court, being for another cause than the duties of the ground, tho' the master was infest *cum curiis*. Auchinleck, (*Vassal*) 26th July 1627, Crichton *contra* Hay. --- A vassal may pursue his tenant in his own court for cutting green wood; the tenant at his entry having consented thereto, and the vassal being infest *cum curiis*. And this, tho' the superior compeared and alledged, that this would render his regality-court useless, yet the Lords found, That the clause *cum curiis* extended not only to a power of holding courts upon tenants for their farms, but for other breaches of their duty as tenants, especially where the jurisdiction is prorogated by consent. Durie, *penult.* January 1630, Denniston *contra* M'Linto. --- A vassal infest by the superior the king's baron *cum curiis* & *bloodwitis*, has right to fine for blood, and therefore was preferred to the sheriff, being the first attacher: For such a base infestment *cum curiis* is equivalent to an heretable bailiary constituted by the superior. Stair, Dirleton, 12th December 1665, Gilmour, January 1666, Cranston *contra* Pringle. --- Found, That a charter from a subject superior, bearing *cum curiis* & *bloodwitis*, gives right to the vassal to name a bailie, and that the bailie may fine in L. 50 for blood, and L. 10 for contumacy. Fountainhall, 23d December 1692, Chessors tenants *contra* Mr. Robert Keith.

Commissary Court.

Of superior
and inferior
commissaries,
and their pri-
vileges.

AN inferior commissary has no power to confirm testaments dative *ad omiffa*. Haddington, 24th December 1606, Crichton *contra* Kirkpatrick.

IN a reduction before the commissaries of Edinburgh, of a decreet-dative given by an inferior commissary, the commissaries of Edinburgh having not only reduced the decreet, but also issued out edicts for confirming another before themselves, who they judged had a better right, the Lords, in an advocacy of this edict, found, That the commissaries of Edinburgh are indeed founded *in jure* to reduce the decreets of inferior

inferior commissaries; yet this being done, that they are *functi*, and can only remit the edicts with or without instructions as they find just; and therefore found, that the commissaries of Edinburgh had no right to confirm this testament, being in another diocese, and so preferred the inferior commissary. Fountainhall, 1st July 1697, commissaries of Edinburgh *contra* commissary of Murray.

A COMMISSARY was found incompetent to judge in a reduction of a tack of teinds. Maitland, 27th April 1553, Ld. Carphin *contra* provost of Bothwell. --- Unless both parties be kirkmen. Maitland, 24th January 1554, Ld. Kinkell *contra* . --- The commissaries, conform to their ancient instructions, 12th March 1563, were found judges competent in a spoliation of teinds, exclusive of the sheriff and all other inferior judges. Colvil, January 1587, Wood supplicant. --- The decret of a commissary, modifying L. 80 Scots to a physician for a cure, was reduced, as *a non suo iudice*; tho' it was alledged, that both custom and the canon law have ever made commissaries judges competent to actions *super salariis medicorum*. Durie, Haddington, 26th November 1622, Liddel *contra* Rob. --- A party before his death having set down in his compt-book the particular debts owing by him, and one of the parties having pursued his executors before a commissary, to hear and see the hand-writ of the book cognosced to be the defunct's, and that he was debtor in the sum, and obtaining sentence; this sentence cognoscing the hand-writ, was found null, as not being competent to the commissaries. Durie, 5th December 1628, Reid *contra* Brown. --- A commissary was found judge competent in an action pursued by a party against his son, for decerning him to subscribe a charter, because of his promise; which promise was referred to the son's oath. Hope, (*Commissary*) 10th July 1622, Ld. Silverton *contra* his son. --- The Lords refused to advocate a process of cognition of debt, pursued against a defunct's representatives before the commissaries of Edinburgh, such processes having a peculiar stile not known in any other court; but if the commissaries committed iniquity, the Lords declared they would redress it in a suspension. Fountainhall, 10th February 1693, Graham *contra* Lockheart.

THE commissaries decret given in a civil cause exceeding L. 40 Scots, was found null by way of exception, as being beyond their instructions. Haddington, 29th May 1605, M'Clellan *contra* M'Clellan. --- An adjudication upon a decret *cognitionis causa*, recovered before the commissaries for 1000 merks, found null. Fountainhall, 1st July 1696, creditors of Cuthbert *contra* Ros.

COMMISSARIES in matters secular cannot be judges to admit any probation but by the defender's oath, except the value of the cause exceed not L. 40; and if a matter not ecclesiastick exceed that sum, they may be also judges thereto, the same being referred to the defender's oath, if the subject exceed not 100 merks; but if it exceed that sum, and be secular, altho' referred to oath, the commissaries are not competent judges therein. Durie, Haddington, 6th February 1624, Gordon *contra* M'Heugh. --- And so a decret pronounced by an inferior commissary, upon the defender's being held as confess'd upon the sum

of L. 60 Scots, was sustained. Durie, 15th January 1630, Aldcorn *contra* Ker. --- The commissaries of Edinburgh cannot judge in cases not consistorial where the sum exceeds 100 merks, nor inferior commissaries where it exceeds L. 40, altho' they are referred to the party's oath. Durie, 18th January 1628, Lord Lindsay *contra* Lady Aiton. --- The Lords refused to reduce a decret in absence of the commissaries, wherein a matter was indeed referred to oath, and the defender held as confes'd; but the sum was but L. 80 Scots, which did not much exceed 100 merks, to which extent their jurisdiction is ordinarily sustained. Durie, 18th June 1634, Richardson *contra* Maxwell.

THE Lords sustained a decret pronounced by a commissary for L. 120 Scots, because it was for three terms mail of a house, at L. 40 *per term*; so that there were *tot sententiæ quot capita in libello*. Durie, 18th, Spotiswood, (Commissary) 19th January 1628, Lord Lindsay *contra* Lady Aiton. Durie, 18th June 1634, Richardson *contra* Maxwell. --- A general action of compt and reckoning *tutela finita*, was found not competent to be pursued before a commissary, the action exceeding the sum to which commissaries are limited, and no respect was had to the allegation of *articulatus libellus*, because the defender is liable (however many the articles be) *tutorio nomine*, as in one general action, and upon one ground, and therefore the Lords advocated the same to themselves. Stair, 8th, Dirleton 9th, Gosford, 11th December 1675, Wright *contra* Vetch. --- The contrary had been found. Durie, 30th January 1629, Horfeburgh *contra* M'Levain.

A DECREET pronounced by a commissary for more than L. 100, was sustained, because it was left in legacy. Durie, 12th July 1626, Turnbull *contra* Matthieson.

Assessors.

THE Lords, upon application of a party, having ordained some of their number to be adjoined to the commissaries of Edinburgh, in advising a process of adherence; thereafter considering the perilous and scandalous consequences of such matters, they recalled that ordinance, and declared, That, in time coming, they would leave the commissaries to discharge their own office, as they would be answerable to God and the king at their own peril. Haddington 27th December 1606, Burnet *contra* commissaries of Edinburgh.

Where the courts must be held.

IN respect of an old decret join'd with use and wont, the commissary of Lanark was found obliged to hold his courts in the town of Lanark, and there only; but prejudice of his sealing and opening the repositories of persons deceas'd, granting summar warrants, and other such like acts of administration; and but prejudice to hold courts *pro re nata* at any place within the jurisdiction, upon any extraordinary emergent. 28th November 1738, town of Lanark *contra* Hamilton.

If commissaries must reside where their courts are held.

A COMMISSARY was found not compellable to make continual residence in the principal burgh of the diocese, but that his clerk ought to remain ordinarily there, and himself to resort thither twice in the week, or oftner, when the lieges require it, which was found sufficient. Haddington, 1st February 1610, Bishop of Dumblane *contra* his commissary. --- The commissary clerk found obliged to give personal attendance,

dance, unless when absent upon just and necessary occasions. Stair, 11th July 1672, Fleming *contra* Nimmo.

Dean of Guild Court.

THO' the dean of guild be an officer and magistrate of the same burgh, yet his jurisdiction and court is distinct, and not subordinate to the bailie court. Durie, 21st July 1631, Adamson *contra* Masterton.

Court of Exchequer.

A BOND taken by the officers of the customs from some persons art and part in defrauding the revenue, for a sum which it was computed the revenue had lost by the fraud, was not found competent to be insisted in before the court of session, but before the exchequer. 12th July 1734, receiver general of his majesty's customs *contra* William Fogo.----After the three years, within which time goods seiz'd by the custom-house officers, as not having paid duty, must be condemned, action found competent at common law, and before any of the ordinary courts, for wrongous seizure, where no prosecution was brought in exchequer. 4th December 1733, Hamilton *contra* Legrand and Pageter. Jurisdiction,

IN a competition betwixt two gifts of forfeiture, presented to be past in exchequer about the same time, the barons having given an undue preference to the last gift, whereby it came first to be completed by investment, a reduction was brought before the court of session at the instance of the first donatar, and the question turn'd upon the competency of the court. On the one hand it was pled, That the exchequer was a sovereign court; and tho' the preference given by them to the last gift was not properly *res judicata*, yet it was such as precluded the cognition of the session, the exchequer being in use to prefer without regard to priority of dates, and had a power to qualify, alter and restrict the king's gifts. It was pled on the other hand, That it was no actual jurisdiction in the exchequer to pass gifts, they acting therein in no other shape than as any nobleman's commissioners who is out of the kingdom. The Lords made a distinction betwixt gifts of escheat, which are within their commission, and which the exchequer may grant or not, as they please; and gifts of forfeiture, which can only be past under the king's hand; and tho' the consent of exchequer be requisite to the consummation of gifts of forfeiture, yet this is only as a step of diligence, in which the exchequer ought to act impartially, and if they do otherwise, an action for remeid must ly at common law. The Lords found themselves competent to judge in this case; and afterwards preferred the first gift. Fountainhall, 12th February 1697, Viscount of Teviot *contra* Earl of Linlithgow.----A creditor having obtained from the exchequer a gift of the single and liferent escheat of his debtor, the same was burdened with 2000 merks a year to the debtor's lady, which was the jointure she had by her former husband, and which belonged to the present husband *jure mariti*: Another creditor obtained a second gift, at the passing of which the lady compar-

An action lies at common law for redress, where the barons of exchequer are guilty of partiality in completing gifts proceeding from the crown.

ed, craving it might be burdened with her 2000 merks, as the former was. The exchequer, upon debate, restricted the jointure to *L.* 1000, and burdened the second gift with the same. In a competition before the court of session, the Lords found the exchequer were *functi*, and could not restrict the first gift by granting a second, and preferred the first donatar, with the burden of the lady's 2000 merks. Fountainhall, 28th December 1697, Howison *contra* Lady Kinnaird.

Justices of Peace.

Jurisdiction. THE sentences of justices of peace in matters of excise, are final, and not liable to review. Forbes, 25th January 1710, Paterfon *contra* Ramsay and others.----The justices of peace can only take a precognition against transgressors in the matter of the customs, the final trial whereof, in order to condemn or clear ships and goods, belongs properly to the court of exchequer. Forbes, 19th January 1711, Evers, &c. *contra* Hunter.----The Lords found justices of the peace not competent to judge in actions on the passive titles, except for small debts, expressly allowed to be pursued before them by the act 38, parl. 1661. Forbes, 15th December 1710, Forsyth *contra* Richie.----Justices of peace not competent to judge of scandal or verbal injuries. Forbes, Fountainhall, 17th July 1711, Sharp *contra* Maxwell.----By act 9, parl. 1703, the justices of peace are competent judges to punish the importers of Irish victual. Forbes, 24th January 1712, justices of peace of the shire of Air *contra* town of Irvine.----A summar complaint having been given in to the Lords, That a neighbour had obtained, by subreption, a grant of a fair from the crown, *in emulationem* of the complainer, they found it not competent before them by way of summar complaint; but were of opinion it was competent in this shape before the justices of peace. Fountainhall, 2d December 1710, Oswald *contra* Morison.

Power of
fining for con-
tumacy.

JUSTICES of peace having fined a person in *L.* 50 Scots for double contumacy, in not appearing to answer to a complaint against him for a riot, and to find bail for keeping the peace after he was twice personally cited; the Lords restricted the fine to *L.* 10, and thought that none could be fined for not finding caution to keep the peace, but only be committed to prison. Forbes, 9th November 1710, justices of peace of the shire of Wigton *contra* Martin.

Quorum.

IN a suspension of a sentence of the justices of peace, fining some persons for breaking or defacing a grave-stone, the Lords found, That two justices of peace made a *quorum*; it being urged, That by the act 6to *Annæ*, C. 6, the powers of the English justices of peace are transferred to the justices of peace in Scotland; from whence it was inferr'd, That as two make a *quorum* in England, the same must obtain here. A further argument was added from the stile of the commission, bearing *duo pluresve*, and also from the constant practice of two justices judging in matters of the excise. December 1730, Reid *contra* Finlaysons.----It was formerly found that three were necessary to make a *quorum*. Dalrymple, Bruce, 19th November 1714, *Ld.* Fullerton *contra* Earl of Kilmarnock.

THE

THE Lords found that defenders before the justices of peace ought to have a competent time to answer, according as the exigency of the matter requires, and allowance of a procurator to compare. Dalrymple, Bruce, 19th November 1714, Ld. Fullarton *contra* Earl of Kilmarnock. Defender must be allowed a procurator, and time to prepare defences.

JUSTICES of peace may summarily imprison, when the cause requires, till payment of the fine. Dalrymple, Bruce, 19th November 1714, Ld. Fullerton *contra* Earl of Kilmarnock. Summary execution.

Lyon Court.

THE Lords advocated a cause from the lyon, it being a pursuit for payment of the debt against a messenger, who had suffered the prisoner to escape. Auchinleck (*Advocation*) 12th December 1627, *contra*. ---- A decreet of the Lord lyon, decerning a messenger and his cautioner (the messenger having malversed) to pay 500 merks of penalty, and damage and interest to the party beside, was sustained as to the penalty of 500 merks, in which the messenger was enacted in the lyon books, but was reduced as to the damage and interest, as being *ultra vires*, the lyon having no jurisdiction in that matter. Stair, 13th February 1668, Grieron *contra* M'Ilroy. 27th June 1673, Heriots *contra* Corbet. ---- The jurisdiction of the lyon had been formerly sustained also for the damage and interest. Dirleton, 26th July 1666, the Lyon *contra*. Jurisdiction

FOUND, That the lyon may convene the messengers in any place before him, tho' in a private house, the place being specially design'd by him in the copy of the summons and execution; and that he was not bound to hold all his courts (as they in their libel alledged he was) in the tolbooth of Edinburgh, seeing his predecessors had been in use to hold their courts in their clerk's chamber. Durie, 26th July 1631, the messengers *contra* the lyon. Where the court must be held.

FOUND, That altho' the messenger's box was appointed for their voluntary charitable help of their decayed brethren, yet the lyon had right to oversee the employment thereof; and therefore found that the messengers might leet and choose any six of their number to be boxmasters, of whom the lyon might choose any two he pleased to keep the said box. Durie, 26th July 1631, the messengers *contra* the lyon. Charity-box

Regality Court.

A LORD of regality has privilege to pursue removings, nonentries and recognitions before his own bailie. Haddington, 1612, *contra*. A Lord of regality may pursue before his own bailie.

AN heritable bailie, made by a Lord in his regality or barony, cannot be altered, but the bailie is not judge *privative*, for the Lord may sit and judge himself, but not appoint another bailie. Haddington, Heretable bailie.

7th February 1610, Earl Bothwell *contra* Ld. Cessford. --- An heritable bailie of a regality has only escheat of court, and not of rebels dwelling within the regality, unless the samen be express'd in his instrument of the bailiary. Haddington, 26th February 1622, Earl Winton *contra*

Sheriff Court.

Jurisdiction. THE sheriffs are competent judges in actions pursued against defenders, as charged upon forty days to enter heirs to their predecessors. Durie, 26th March 1631, Seaton *contra* Home. --- The Lords sustained a decret of adjudication pronounced by a sheriff upon a renunciation to be heir. Forbes, 4th January 1709, Ker *contra* Primrose. --- In an action betwixt Lindsay and Crawford, for certain vicarage teinds of the parish of Kilbride, the question arising *obiter* anent a decret of spuilzie of teinds given by the sheriff of Lanark, it being alledged that it was null, as being given *a non suo judice*; seeing the sheriff having no power to grant inhibition, could not be judge to the spuilzie upon contempt thereof; the other answering, That he was judge to repair any violence done in that shire: The Lords would not annul the decret by way of exception. Haddington, 22d February 1623.

Enactment before the sheriff to appear before the court of justiciary.

A SHERIFF having caused two persons enact themselves, with a cautioner, to compear before the justice, and underly the law for murder, under a certain penalty; the saids acts were reduced, in respect that the sheriff had no power to oblige them to enact themselves, unless they had been taken *in flagranti crimine*, or that there had been a preceeding charge against them. Durie, 26th March 1628, Lord Lovat *contra* sheriff of Nairn.

What Courts competent for registration in order to diligence?

A BOND registred in a jurisdiction where the debtor dwells not, is a null decret, as pronounced *a non suo judice*. Fountainhall, 8th November 1692, Schaw *contra* Kennedy.

IN a competition among the creditors of a bankrupt, it being objected against some, That their bonds were registred in a commissary's books, and their precepts of arrestment taken out thence, altho' the sums were great; the Lords, notwithstanding the custom so to do, found the diligence on the commissary's precepts of arrestment null. Fountainhall, 3d February 1703, Weir *contra* Cochran. --- The Lords granted warrant to give up a principal bond out of the commissary court books of Edinburgh, after it was booked there, in order to register the same in the books of session, that an adjudication might be led thereupon. Forbes, 23d June 1705, Matthie supplicant *contra* commissary clerk of Edinburgh. --- But in the like case, the Lords refused to grant warrant, because registration being a decret of consent, is a prorogation of the commissary's jurisdiction. Dalrymple, 15th, Fountainhall, Forbes, 16th January 1706, Young and Man supplicants

supplicants. ---- In a ranking of creditors, it was objected against an adjudication, that it was null, as being founded upon a bond above *L. 40 Scots*, recorded in the commissary court books; the Lords found the commissaries books not a competent register for bonds or bills above the sum of *L. 40 Scots*, unless where there is a consent of the parties to register in these books; but in respect of the *communis error*, they repelled the objection made to the registration of this bond in these books, and declared, they would make an act of federunt, to certiorate the lieges in time coming of the incompetency of registrations in the commissaries books. But the commissaries of Edinburgh having applied by petition in their own name, and in behalf of the other commissaries of Scotland, to be heard against the intended act of federunt, a pleading in presence ensued; upon which the Lords appointed a memorial to be given in, and there they allowed the matter to rest, without making an act of federunt. February 1737, ranking of the creditors of Govan of Cameron.

TESTAMENTS where confirmable. See *Forum competens*.

POWER of naming officers of court. See *Publick officer*.

POWER in the court of session of supplying defects in adjudications. See *Adjudication*.

AS to their power of supplying defects in other deeds. See more in *Arbitrium boni viri*.

JUS QUÆSITUM TERTIO.

STIPULATIO in favorem tertii, was found valid, altho' the third party was neither present, nor knew any thing of the bargain. Durie, 25th, Spotswood, (*Contract*) 26th June 1634, Ld. Renton *contra* Lady Aiton. Colvil, December 1591, Wood *contra* Moncur. Stair, 8th June 1676, Irvine *contra* Forbes. ---- A husband being infest in an annualrent out of lands, and disposing the same, with reservation of his own and his wife's liferent, who was not infest with her husband in conjunct fee; in a process at her instance against the possessors of the lands for the annualrent after the man's decease, wherein the heir concurred with them to defend, the Lords found, That the said reservation gave her good right against the heir and his tenants, altho' it would not have been sufficient against a singular successor. Auchinleck, (*Liferenter*) 28th June 1627, Ld. Madridge and his spouse *contra* Cockburn.

THE Lords sustained the delivery of a paper, tho' not to the party, but to another for his behoof, tho' he knew nothing of it, and so could not accept of it. Fountainhall, 20th January 1686, Borthwick *contra* Laurie. ---- Property may be transferred without the knowledge and consent of the disponent, and sasines are ordinarily given to infants, or

Stipulation in favours of a third party.

Delivery for behoof of a third party.

persons out of the country. Upon which footing, recognition was sustained upon an infestment granted to an infant out of the country, without necessity to alledge there was any mandate to accept of the infestment. Stair, 30th January 1663, Lady Carnegie *contra* Lord Cranburn. --- A bond of entail, subjecting the maker himself to the prohibitory and irritant clauses equally with the substitutes, being deposited by him in a third party's hands, upon the following terms, contained in a relative writing, *to the laird of Carpow, to be kept for the use of all concerned*; the Lords interpreted the clause as if it had been said for the use of the granter, and after his decease for the use of the substitutes; and therefore found, That the maker had right to call for the same as his proper evident, to be cancelled or not at his pleasure. Dalrymple, 8th December 1714, Lord Lindoires *contra* Stewart of Innernytie.

Order to pay
money to a
third party.

THE creditor in a bill having given orders to his trustee to whom it was indorsed, to pay a part of the money to a third party his creditor; the Lords, notwithstanding the order, found the property of the money remained with him who sent the advice, and therefore might be arrested by his creditors. Dalrymple, Forbes, 16th January 1706, Lord Ross *contra* Gray. Fountainhall, 21st July 1697, Inglis *contra* Clark.

Backbond
when under-
stood to be de-
signed in fa-
vours of third
parties.

IN a bargain of lands, the purchaser was taken bound by the minute to pay the price to a creditor of the sellers; it was argued, that this was but a mandate, which the seller might recall at his pleasure. It was found, That this was not a simple mandate, but a delegation, which gave a right to the creditor, and could not be recalled by the seller. Stair, 7th July 1664, Ogilvie *contra* Ker. --- The like, Durie, 9th January 1627, supplicants *contra* Nimmo. See Forbes MS. 1. 10th February 1714, Carmichael *contra* Wilson. --- One disposed his estate in trust, and took the trustee's backbond, obliging him to sell the same, and apply the price for satisfying the disponent's creditors, and the remainder to be applied to the disponent's wife and children. The lands having been sold in execution of this trust, a part of the price remaining in the trustee's hand, was confirmed by an executor-creditor of the disponent as *in bonis defuncti*; it was found, That this confirmation could afford no ground of preference in competition with the other creditors, seeing there was somewhat further intended in this transaction than a bare commission to the disponent for the behoof of the disponent. The backbond bore, That the disposition was granted in order that the price might be applied to the creditors; which argued, that the disponent had a view to his creditors, and was stipulating for their security, February 1729, competition betwixt Goldie of Haughyet and Mr. Andrew Aitken, &c.

What action
competent to
the third par-
ty.

ONE having assigned a bond to a trustee, taking his backbond to denude in favours of one of the cedent's creditors, and, he being satisfied, in favours of the rest; both the parties deceasing before the money was recovered, and that first creditor's heir insisting against the debtor in the assigned bond, without any previous process against the trustee's heir to denude in terms of the backbond; the Lords sustained the pursuer's interest, as sufficient to give him a title on the trustee's backbond,

backbond, to prosecute this action against the debtor in the bond assigned. Fountainhall, 18th December 1707, Lady Pitmedden and her husband *contra* Gordon.

AN assignation was granted, bearing to be for relief of the assignee's cautionry, and also for relief of another cautioner; this clause was found to import a proportional relief to both, according to their engagements. Stair, 18th July 1672, Watson *contra* Bruce. --- A purchaser of lands, who had obliged himself to pay a certain number of the seller's debts, to the extent of the price of the land, conform to a list given up to him; was found *in mala fide* to pass by one of these debts, and apply the whole price to the payment of the rest, altho' these other debts did exhaust the price: For he ought to have paid all the debts in the said list proportionally, tho' no diligence had been used for any of them. Forbes MS. 20th July 1714, Blair *contra* Graham. --- When an obligation given to clear incumbrances specifies some by their particular names, and then subjoins a general of all other incumbrances, these particularly named are preferable. Durie, 5th February 1635, Ker *contra* Knows.

Among third parties having an interest, who is preferable?

WHERE a right arises to a third party from a donation *inter virum & uxorem fante matrimonio*, the revocation of such donation will not void the right of the third party. Durie, 18th December 1633, Bishop of St. Andrews *contra* Wylie.

Voidance of the principal right, will it void the third party's interest?

WHEN a bond or assignation is taken in name of a third party, in what cases is there a *jus quæsitum*. See *Presumption*.

Jus superveniens auctori accrescit successori.

A PRIOR and better right coming in the person of one who was obliged to warrant a posterior one, the said posterior was preferred to the prior. Nicolson, (*Warrantice*) 16th January 1621, tenants of Foulden *contra* Brown and others. --- The Lords found, That a right supervening in the author's person accretes to him to whom he is author. Nicolson, (*Jus superveniens*) 20th February 1628, Innes *contra* Innes. --- A tack set by a lady, of lands to which she afterwards acquired right, sustained against her. Durie, 12th July 1626, Lady Kilbirny *contra* her tenants. --- The setter of a tack of teinds having thereafter acquired an infestment of annualrent, this infestment of the authors was found not to accrete to the tacksmen to defend him against the true titular of the teinds; for the tack was partly gratuitous, and did not mention *for all right he had or should acquire*; which, tho' exclusive of the author himself, could not make a supervenient right accrete to validate the tack, otherwise null. Stair, 19th July 1664, Douglas *contra* Ld. of Wedderburn. --- A patron who had a tack of the teinds of the parish, communicating the same to an heretor.

Where the author is liable in warrantice.

so far as concerned his teinds, and obliging himself never to purchase any other right to these teinds, or that the same should accresce; the property of the teinds bestowed upon him *qua* patron by the act 1690, was found to accresce to the heretor, tho', properly speaking, it was not an acquisition by the patron, but given him by a supervenient law. Fountainhall, 2d December 1698, Viscount Arbuthnot *contra* Ld. Allardice. ---- A feu-vassal of kirk-lands neglecting the benefit of the act of parliament 1584, *cap.* 7. appointing confirmations to be granted to such feuers who should apply within a limited time, otherwise the feus to be null; the abbot who set the feu, having been made thereafter lord of erection, the supervenient right was found not to accresce to the vassal, seeing it was by his own fault that confirmation was not obtained. Durie, *ult.* June 1629, Lady Dumfermline *contra* the Earl.

Where the author is not liable in warrandice.

A VASSAL's right having fallen by the forfeiture of his mediate superior, the gift of forfeitry purchased in by the immediate superior, was found to accresce to the vassal: For tho' it was doubted if the absolute warrandice in general, *contra omnes mortales*, did extend to guard against forfeitry, so as to furnish any action against the immediate superior, in case the lands had been evicted by any third party as donatar to the forfeitry; yet seeing the gift was acquired by the immediate superior himself, the benefit thereof must accresce to the vassal. Durie, 10th March 1636, Crawford *contra* Ld. Murdiston. ---- A gift of ward being taken for the behoof of the ward-vassal himself, or any way acquired by him, he was found obliged to communicate the same to his subvassal, without having any claim but for a proportion of the composition, and expences laid out in procuring the same; and this, tho' the subvassal had not his superior bound in any sort of warrandice against this casualty. Stair, 15th February 1665, Boyd *contra* tenants of Carsleuth. Stair, Dirleton, 1st December 1676, Lord Lindsay *contra* Grierfon. ---- The like of a gift of marriage. Marcus (*Ward and Marriage*) January 1686, Drummelzier *contra* Murray of Stenhope. ---- And it appearing that the ward-vassal had obtained this gift of his own marriage, for alledged good services, without paying any composition, he was found entitled to demand none. *Ibid.*

A WARD-VASSAL getting the gift of his own ward, must continue the tenants in possession, even during the ward. Colvil, June 1581, Arnot *contra* tenants.

A WIFE being taken consenter to her husband's disposition of lands, to which she has no right for the time, is not barred thereby from setting up any right thereafter acquired from a third party, in competition with the disponent; consent implying only, that upon any right from her husband, or then in her person, she shall not impugn the deed to which she has consented. Stair, 4th, Dirleton, 8th January 1668, Forbes *contra* Innes. Stair, 27th January 1681, Stewart *contra* Hutchison. 7th July 1681, *inter eosdem*.

A SUPPOSED superior having granted infeftment to an appriser of the property, did afterwards acquire a right to the superiority, which was not found to accresce to validate the appriser's infeftment, null, as granted *a non habente potestatem*; neither was it found to remove the superior *personali objectione*, from seeking the nonentry duties, because the

the appriſer paid no compoſition for obtaining infeſtment; and therefore being merely gratuitous, and granted *periculo petentis*, it could infer no warrandice. Stair, 22d December 1675, town of Muſleburgh *contra* Scot.

THE author's right was an infeſtment, null for want of confirmation, out of which was granted a baſe infeſtment of annualrent to one creditor, and thereafter an appriſing led thereof by another, with infeſtment: After all the author's right was confirmed by the king, which was found to accreſce to the baſe infeſtment of annualrent, as being the firſt completed right *in ſuo genere*. Stair, 16th January 1663, tenants of Kilchattan *contra* Lady Kilchattan. --- An author's infeſtment was found to accreſce to a tack granted with abſolute warrandice, and not to a poſterior diſpoſition of the lands; tho' it was offered to be proved, That the infeſtment was procured by the diſponee's means, and conſequently was taken in order to validate the diſpoſition. Stair, Goſford, 21ſt June 1671, Neilſon *contra* Menzies. --- In a competition betwixt an adjudger, and one who had a diſpoſition, the adjudger having omitted to charge the apparent heir to enter in ſpecial, but he having actually entred thereafter. Alledged for the adjudger, That *jus ſuperveniens auctori accreſcit*, &c. Answered, The ſerving and infeſting the heir was done by the diſponee to complete his own right; and it were abſurd that this ſhould turn againſt him in favours of his competitor. The Lords found, That the adjudger having omitted to charge the apparent heir to enter, he could not plead the benefit of the ſubſequent ſervice and infeſtment, and therefore preferred the diſpoſition. Fountainhall, 11th January 1699, Duncan *contra* Nicolſon. --- In a competition betwixt two diſpoſitions, granted by an apparent heir, of an heritable bond belonging to his predeceſſor, the Lords preferred the receiver of the firſt diſpoſition, intimated to the debtor in the bond before granting the other, altho' the common granter was ſerved heir upon the procuratory contain'd in the ſecond, in order to complete and validate that right; for the ſervice was found to accreſce to the firſt right, which contained alſo a procuratory, and warrandice from fact and deed. Forbes, 28th February 1708, Aliſon *contra* Chalmers.

To which ſucceſſor does the right accreſce?

JUS ſuperveniens *if it holds in the caſe of conſenters?* See *Imphy'd Diſcharge and renunciation*.

JUS TERTII.

IT is *jus tertii* for a party to found upon a ſtipulation conceived in his favours, unleſs he can ſhew a benefit thereby; and the ſtipulation may be tranſgreſſed *impune*, where the party, in whoſe favours it is conceived, is not prejudged thereby; and therefore two appriſers having entred into a contract, that neither of them ſhould annulzie their intereſt under the pain of forfeiture, action upon the contract was reſuſed againſt the party tranſgreſſing the ſame, where the purſuer could

Purſuer muſt qualify a legal intereſt, otherwiſe no proceſs.

could qualify no damage by the alienation. Durie, 11th February 1630, *Ker contra Lempitlaw*. ---- Sir Robert Hepburn having provided his estate to young Congleton, with this provision, That he should take and use the name and arms of Hepburn, and marry Cockburn of Pilton's eldest daughter; and with this irritancy, That if he contravened, his second brother should succeed to the estate. After Sir Robert's death Congleton was required by the gentlewoman's friends to marry her, and upon the refusal, a process was raised at her instance for declaring that he had lost his right to the estate, by refusing to marry the pursuer, according to Sir Robert's appointment. Alledged for the defender, That the pursuer had no title to pursue this declarator, in respect the benefit of the irritancy was not to accrue to her, but to the defender's brother, who was to succeed by the tailzie, without the burden of marrying her, and he did not concur, so that the most the pursuer could pretend to, was but damage and interest, against which the defender had complete defences. The Lords sustained process at the pursuer's instance for declaring the irritancy. Home, December 1684, *Harcus, (Alienation)*. February 1685, Jean Cockburn *contra* Congleton. But it would appear that this interlocutor has been thereafter altered, and the process has turned into the shape of damage suffered by the pursuer, through the defender's refusing to marry her in terms of the entail, which the Lords sustained: For it is not to be thought the Lords would declare the irritancy in favours of the brother, and at the same time give damages to the pursuer. *Harcus, (Tailzies)*. February 1687, *inter eosdem*. ---- Superiors have an interest to pursue improbation of retours against their vassals, because if the retour fall, the lands will be in non-entry. Durie, *ult.* February 1628, Earl Nithsdale *contra* Ld. Westraw.

Competent to the defender to found upon a third party's interest, or other argument, to show there is no ground of claim.

A SHERIFF, or other magistrate, being pursued to pay a debt for which the rebel was denounced, because he, being charged to take him, had not obeyed, or because he suffered him to escape, will have interest to reduce the horning, albeit the rebel concur not. Haddington, *ult.* January 1611, Ld. Caddel *contra* Vanse. ---- The like, Durie, Spotiswood, (*Caption*) 28th November 1628, Baillie *contra* Potter. Durie, 25th June 1642, Wylie *contra* bailies of Wigton. Durie, 14th July 1626, Adams *contra* bailies of Air. ---- But it was found no defence to the magistrate, that the debt was paid by the rebel's cautioner, seeing the cautioner might use the creditor's name for his relief. Durie, Spotiswood, (*Caption*) 13th July 1630, Hay *contra* Earl Marischal. ---- In a pursuit for liquidating the avail of a marriage, it being alledged by the donatary, That it was *jus tertii* for the apparent heir to say, that his father died not in the fee, as being denuded by an adjudger, who was publicly infest, unless that adjudger would appear and defend. The Lords found, That it was not *jus tertii*, but competent to the apparent heir to found upon it. Fountainhall, 13th February 1707, Lord Rae *contra* Innes. ---- In a removing from wardlands, it was found not *jus tertii* for the tenant to alledge, that the defunct his master was denuded by a comprising and infestment, after which the ward could not fall by his death. Hope, (*Ward*) 22d July 1625, Ld. of Ley *contra* Bar. ---- The vassal's mother being infest in the lands holden of the superior and confirmed, obtaining a gift of his ward, the Lords, in a removing at her instance against the subvassals, found,

found, That her confirmation excluded the ward; tho' it was pled for her, That, having two rights, she might use either of them at pleasure, and that it was *jus tertii* for the defenders to plead upon her confirmation, to protect themselves from the casualty of ward. Durie, Auchinleck, (*Ward*) 7th July 1629, Lady Cathcart *contra* tenants. ---- In a declarator of nonentry, at the instance of the king's donatar against subvassals, upon the vassals lying out unenter'd, the Lords sustained this exception, That by a condition of the vassals infeftment, the lands, in default of heirs-male, were to return to the crown; which condition being purified, the lands are in his majesty's person, and consequently are full, seeing the king needs not be infeft. Spottiswood, (*Nonentry*) 24th June 1629, Murray *contra* vassals of Athole. ---- A wife in her contract of marriage having accepted of certain lands in satisfaction of her terce, these lands holding ward, were found to fall to the superior by the death of the husband during the minority of the heir; tho' it was pled for the wife, That her right ought to be sustained to the extent of a terce; which being established by law, excludes the ward: And as to the renunciation of the terce, that was a private paction betwixt the husband and the wife, never design'd to benefit the superior, in prejudice of the wife's right and husband's warrandice. Stair, 23d June 1671, Lady Ballagan *contra* Lord Drumlanerick.

IN a pursuit upon a bond for a considerable sum, at the instance of an assigney, it was found competent for the debtor to alledge that the assignation was null, being subscribed only by one notary. Haddington, 25th January 1610, Wardlaw *contra* Earl Marischal. ---- In a process at the instance of a donatar of escheat, it was found not competent to the defender to quarrel the horning upon any nullity, unless he could qualify an interest, by having right from the rebel or from the king upon another horning. Haddington, 23d June 1612, Earl Mar and Thomas Ewing *contra* Ld. Ley. ---- He whose land is comprised by an assigney has interest to improve the assignation, because the comprising will fall of consequence. Haddington, 19th January 1610, Ross *contra* Stewart. ---- This exception proponed by a party in whose hands arrestment was laid, *viz.* That the arrester could not demand the sum to be made forthcoming, in regard he had recovered payment from the common debtor, was found not competent to be proponed by him who purged not the debt owing by himself to the common debtor. Durie, 21st December 1621, Hamilton *contra* Durham. ---- Found *jus tertii* to a debtor in a bond to plead upon a backbond granted by an assigney to his cedent, obliging himself that the sum should return to him in case the assigney predeceased him, altho' the event actually happened. Durie, 15th January 1628, Falconer *contra* Beatie. ---- A mother who contracted a tocher with her daughter at her marriage, was found intitled to repete the same from the husband, her daughter having died within the year, altho' it was alledged that the tocher was paid out of the daughter's means, and therefore repetition competent only to her representatives; in regard it was *jus tertii* to the husband to plead upon their right, and he ought to repete to the mother from whom he got it, she being liable to her daughter's representatives if she meddled with her money; only she was ordained to find caution to the husband to warrant him at their

But not competent to object against my party's title, unless I can qualify a legal interest. And what is understood to be a legal interest?

hands, and at the hands of all others claiming interest. Durie, 13th July 1627, King *contra* Ker.---- A party who had no right, having assign'd a bond, but the creditor having also subscribed the assignation as consenter, it was found *jus tertii* for the debtor to plead that the cedent had no right, which is only found competent to the creditor's representative. But the Lords ordained the pursuer to find caution to warrant the defender at all hands. Durie, 28th February 1637, Lockhart *contra* Simpson.---- James Ballantyne took a bond payable to himself, and after his decease to Ballantyne his son; John Ballantyne's name was afterwards filled up in this bond, tho' he was born after the date thereof, and he was found to have good action as a substitute against the debtor, who had no interest to debate how John's name came into the bond, that being *jus tertii*, seeing there was no other heir or child pretending right. Stair, Dirleton, 5th January 1675, Ballantyne *contra* Edgar.---- An heritor being pursued for his teinds upon a tack set by a parson, it was found not *jus tertii* for him to object that it wanted the patron's consent, seeing he had an interest to pay safely, and therefore not to one who had no sufficient title. Stair, 19th January 1669, Earl of Athole *contra* Robertson.---- In a process at the instance of a defunct's relict and children against the executors, these last being confirmed, and craving deduction for the moveable heirship, as the best of each species of the plenishing, which the heir would have right to, tho' here he had not claimed it; the Lords found that the whole was to be accounted for, but ordained the receiver to find caution to warrant them against the heir when he appeared. Fountainhall, 19th June 1708, relict of *contra* children.----- A person having tailzied his estate, consisting only in money laid out in personal securities, with irritancies not to alter the succession; and in case of uplifting any of the sums, to reemploy the same in the terms of the tailzie; in a pursuit at the instance of the heir of tailzie against one of the debtors, the Lords repelled the defence founded upon the said clause of reemployment, and found that the defender had no interest in the said reemployment, and refused to name any of their own number, at whose sight the money should be reemployed, the tailzie requiring no such thing. Fountainhall, 3d February 1702, Lord Bellenden *contra* Earl Roxburgh.---- The like. Fountainhall, 12th January 1698, Lord Bellenden *contra* Earl Annandale.---- In a declarator of liferent-escheat, it was found *jus tertii* for the vassal and his creditors to alledge that the vassal's sasine was not registred, and had several other intrinsic nullities, because the sasine, *ex facie*, made the defender vassal to the pursuer; and objecting against that sasine, was doing no more but pleading in the crown's right, to whom the liferent-escheat must fall, if there was no sasine. Durie, 18th February 1631, Lord Cranston *contra* Scot.

A DEBITOR objecting against the donatary of his creditor's forfeiture, that the creditor himself was only an executor, which being an office, could not be assign'd, far less could be carried away by the forfeiture, except as to the executor's own share. The Lords found this alledgeance *jus tertii* to the debtor, and therefore repelled it. Fountainhall, 4th, Marcus, (*Executry*) 6th November 1686, Graham *contra* Lin.---- A spuilzie was sustained, altho' at committing the same, the party injured was at the horn, it being found *jus tertii* to the defender to alledge, That the action in that case was competent only to the

the king and his donatar. Maitland, 16th July 1552, Ld. Kinfauns *contra* Ld. Craigie. --- A liferent being constituted to a lady by her husband, who was only liferenter himself, his son being in the fee, and she, after her husband's decease, pursuing the tenants to remove; this exception proponed by them, That the liferent was now extinct, was repelled, as being *jus tertii* to them. Colvil, December 1582, Countess of Errol *contra* tenants.

IN a declarator of property, the defender pretending no right in his own person, was not suffered to make any objection against the pursuer's title. Stair, 18th July 1662, Lord Frazer *contra* Ld. of Philorth. --- Adjudication of the teinds of certain lands, with infeftment thereon, was found to be no sufficient title to oblige the heritor of the lands to make payment of the teinds, without producing the adjudication itself, and instructing a right to them in the person of him they were adjudged from, altho' no other right appeared to compete. Forbes, 29th November 1710, Mitchel *contra* Baillie and Shearer. --- In a declarator of property of teinds, the title of the process was a right labouring under many infirmities, but which was contended to be sufficient against heritors pretending no right to the teinds of their lands; and that it was *jus tertii* for them to object against it. It was yielded for the defenders, any presumptive title may do in a question of lands, because no man can pretend interest in or to lands but in consequence of a written document, which if he has not, it is *jus tertii* to object against any presumptive title in the pursuer; but that can never happen in a question of teinds, because an heritor's right to the lands, suppose he has none to the teinds, gives him a plain interest to object any man's being declared titular of his teinds. *1mo*, Because every heritor has a right to have his teinds declared free, rather than in the property of any man, and that because several legal interests arise to him thereby. *2do*, Every heritor has an interest that his teinds should belong to the crown rather than to a subject, the exchequer being in use to grant tacks to heritors of their teinds at a very easy rate, and rather to belong to the patron from whom they can acquire at six years purchase, than to any other titular who can demand nine. The Lords sustained the pursuer's title in the same way, as if the action had been a reduction and improbation of land-rights. 7th January 1729, Earl of Home *contra* the heritors of the parish of Eccles.

ONE served and retoured heir, having, upon that title, intented reduction of a third party's infeftment, it was found competent to the third party to challenge the pursuer's retour, as not being nearest of blood to the defunct: And it was found not *jus tertii*, unless the pursuer would throw up his reduction, and renounce any claim he did pretend to the lands in question. Durie, Spotiswood, (*Interest*) 23d July 1630, Ld. Pitligo *contra* Davidson. --- A party serv'd and retoured heir to a defunct, offering to redeem, an adjudger, who alledged, That the party to whom the heir was retoured, was presumed alive, his death not being instructed; the Lords found that the alledgeance was *jus tertii* to the adjudger, and sustained process at the heir's instance upon the retour produced, in regard there was no nearer heir quarrelling the same. Fountainhall, 17th July 1688, Hoge *contra* Dobie. --- In a reduction of a wadset pursued by an appriser, the defender having proponed prescription of the apprising, which was the pursuer's title; the Lords repelled the defence, and found it *jus tertii* to the wadsetter to object

prescription against the pursuer, and sustained process; tho' it was contended, that the prescription took off the *jus agendi* on the apprising, as much as if it had been renounced, prescription being a legal renunciation of the right. Fountainhall, 7th November 1704, Nicol *contra* Park.----The Lords found the action of exhibition *ad deliberandum* competent to all kinds of heirs male and of tailzie, as well as heirs of line; but found it relevant to stop process at an apparent heir's instance, that it was offered to be instructed that there was a nearer heir male. Forbes MS. 10th February 1714, Crawford *contra* Crawfords.----A haver of writs was ordained to deliver them up to a tutor-dative, who had found caution, notwithstanding the defender offered to prove that there was a tutor nominated in the testament. Spotiswood, (*Tutor*) 11th July 1628, Skilton and his tutor *contra* Brown.

In a competition betwixt two apprisings, whereupon infeftment had followed, both led before the act bringing in apprisers *pari passu*; the first appriiser was also first infeft, but it was objected against the infeftment by the second appriiser, That it was null, being in the name of an assigney to the apprising, who did not appear to have any right, no assignation being produced. The Lords sustained the objection, and did find it not *jus tertii* to object the want of the assignation. N. B. The competition ran betwixt the second appriiser and the heir of the first appriiser, who had also in his person a conveyance from the assigney, in whose name infeftment was taken. Stair, 22d July 1668, Johnston *contra* Arnold.----In two mutual declarators touching the right of a salmon fishing, the one producing a right from a subject of a very old date, but not well connected for many of the intervening years; and the right of the other being a charter from his majesty of a much later date: The Lords found, that the latter had no interest to object the nullity of the want of mid-couples to the former; and that it was *jus tertii* and incompetent for him to object and obtrude that defect, unless he derived right from the same author, or any succeeding in his right. Fountainhall, Dalrymple, 3d December 1701, Forbes *contra* Udney.----A party being near 100 years ago infeft in a feu, and some years thereafter another having apprised it from him, and disposing the apprising to a third party; the superior's heirs raising improbation against the last disponent, and certification being extracted *contra non producta*, viz. the principal sasine on the first charter, and the grounds and warrants on which the said apprising was led; yet the defender being still allowed to be heard, the Lords found, That the pursuer could not quarrel the want of these evidents, because, as heir to the granter of the charter, he was liable to warrant it, and therefore *jus tertii* for him to quarrel any right derived from the feu, and founded upon that charter. Forbes, 31st January, Fountainhall, 1st February 1712, Earl of Forfar *contra* Gilhagie.----The Lords allowed a party, who had a real right upon lands, to object against a competing adjudication, that it was null for being led upon a bond paid by the debtor, altho' he who quarrelled the adjudication derived no right from the person against whom it was led. Forbes, 18th December 1708, Erskine *contra* Hamilton.----A nullity of the execution of a warning given to a tenant to remove, being objected against an adjudger, whose adjudication was expired, by another who was not within the year of him, but both were infeft; the Lords found the nullity not competent for this second adjudger to object, unless he were either preferable, or to
come

come in *pari passu*, and therefore repelled it as *jus tertii* to him, Fountainhall, Forbes, 30th June 1708, Rule *contra* Purdie.

AN apparent heir offering to renounce, and the creditor thereupon craving decret *cognitionis causa*; another creditor also compearing and alledging, That he could not renounce having intromitted with his predecessor's goods, &c. was refused to be heard, because he might insist in a process by himself, and there qualify the person to be heir, as accords; but found, that this could not stop the pursuer in the course of his diligence *qui sibi vigilavit*. Durie, 20th December 1626, *contra* Scot.

IN a pursuit for teinds belonging to the lordship of Dumfermline, founded upon a tack granted by Charles I. and another by king William, the defender pled that he was patron of the parish, and consequently titular of the teinds, by the act 1690; and tho' that act did not prejudice any prior right to teinds, yet it was good against the pursuer who had no right: For as to the tack from Charles I. the same was expired; and as to the tack from king William, his majesty could have no right to these teinds, because the lordship of Dumfermline was the property of queen Anne of Denmark, and the same belongs now to James VII. who, tho' he has abdicated the crown, is not divested of any of his private property. Answered, The tack from Charles I. subsists *per tacitam relocationem*, until it be interrupted by some having a better right; and as to the tack from king William, it is *jus tertii* for the defender to obtrude, that queen Anne of Denmark's nearest of kin stand in the property of these teinds, unless he derived right from her, or some bruiking by her right. The Lords repelled the defence, seeing the defender did not derive right from queen Anne, or any possessing in her right. Fountainhall, 26th January 1699, Marquis of Tweeddale *contra* Sir David Thoires.

AGAINST a declarator of the jurisdiction of constabulary the negative prescription being objected, the Lords found, It was not *jus tertii* for the defenders to object the same; for tho' it is not competent to plead an exemption from the jurisdiction of the crown, to which every one is subjected by his allegiance, it is otherwise with regard to a private jurisdiction, which is a burden upon the lieges, and the worst of servitudes. 7th December 1731, Lord Dun *contra* town of Montrose.

AN alledgeance of nullity of an escheat single and liferent, as taken for the rebel's behoof by his domestick servant, was repelled, as being proposed by the lord treasurer, advocate or comptroller, or any other not having interest, unless it were proposed by a creditor or competing donatar. Haddington, 19th February 1601, tenants of Scoon *contra* Sir Hugh Hereis. — Nullity of a gift of escheat as taken to the rebel's behoof, was sustained at the instance of a posterior donatar against a prior. Haddington, *penult.* May 1605, Douglas *contra* Spalding and Weir. — The same objection not only sustained in favours of the creditor at whose instance the rebel is denounced, but in favours of any other of the rebel's creditors attaching the subject. Durie, 28th March 1637, Hamilton *contra* tenants. — 'Tis not competent to one deriving right from a rebel by assignation, after the single and liferent escheats are gifted and declared, to quarrel the gift upon act 147, parl. 1592, as simulate and null, by the donatary's allowing the rebel to

Objections,
privileges, &c.
competent to
some, and not
to others.

continue in possession. Forbes, 10th January 1712, White *contra* Reid. ---- A person having the gift of ward, marriage and nonentry, his declarator of nonentry of divers years afterwards, was found not elidable by an alledgeance, That such gifts of nonentry last only three terms after the ward; because this defence is not competent to the vassal, but to the officers of state, or any other donatar. Haddington, 6th July 1611, Dickson *contra* Ld. Dawik. ---- But in a process of special declarator, at the instance of a donatar of single escheat, it was found competent to the defender to plead, That the bond was granted by him more than year and day after the denunciation, and consequently fell not under single escheat, tho' the gift bore all goods and gear that should belong to the rebel before his decease, seeing such gifts are restricted to what the rebel shall acquire within year and day; and it was not found *jus tertii* to quarrel the pursuer's want of title. Marcus, (*Escheat*) January 1684, Neilson *contra* Kennedy. ---- In a reduction of a sub tack, to which sub tack the principal setter had consented and had subscribed the same; this reason of reduction was repelled, *viz.* That the sub tackman had incurred the failzie in his tack, by not paying the tack-duty at the terms therein express; because the tack-duty was not payable to the pursuer, but to the principal tackman who was not insisting; and this altho' the said pursuer had raised inhibition, and thereby alledged he was come in the principal tackman's place, which inhibition was intimated to the said tackman: But this was repelled, unless the pursuer had obtained it first declared, that the right to the duty was established in his person. Durie, 13th December 1626, Earl Galloway *contra* M'Culloch. ---- A purchaser of the superiority of feulands, has not access to declare an irritancy *ob non solutum canonem*, incurred during the time the right was in his author, because such an irritancy does not *ipso jure* annul the feu, giving only a personal privilege to the superior, which he may use or not at his pleasure. Haddington, 14th February 1612, Ld. of Wedderburn *contra* Nisbet. ---- One infest feu in lands, which pertained once in burgage to a town, pursuing a removing against some burgeses, it was objected, That his title was null by the 36th act, parl. 1491, and by act 185, parl. 1593. which statutes, That the burrows may not set their common good for longer space than three years; this was repelled, seeing the town nor no party having a better right quarelled the title. Durie, 10th February 1631, Earl Galloway *contra* Burgeses of Wigton. ---- An exception upon the common clause in gifts of escheat, That the donatar shall not use the gift to the prejudice of the rebel's creditors, was found not competent to be proponed by the rebel himself, altho' it was alledged, that he was interested to see his creditors rather paid by his own escheatable goods, than that the donatar should meddle therewith, and then the creditors should have recourse to his lands and person. Spotiswood, (*Escheat*) 23d March 1630, Murray *contra* commissary of Dunkeld. ---- The Lords found an objection against a minister's admission by the presbytery, *jure devoluto*, as null, for want of a presentation from the patron, conform to the statute 10mo *Annæ*, not competent to be made by the heritors summarily in a process at the minister's instance against them for payment of his stipend, but only by way of reduction at the patron's instance, where the presbytery should be called for their interest. Forbes MS. 18th June 1714, M'Bayn *contra* Ld. Scatwel. ---- An infestment of annualrent was found null by exception, because granted by
a traitor

a traitor, and not confirmed, altho' the party opponent had not right by the forfeiture. Hope, (*Forfeiture*) 8th March 1620, *contra*

. ---- In a competition betwixt an assigney and the cedent's creditor, the Lords found, That the creditor might propone nullity of the assignation, as granted *stante rebellione*, altho' he was not the creditor at whose instance the horning was raised. Nicolson, (*Assignation*) 20th July 1623, *Caldwel contra Durie*. ---- The nullity of an assignation made *stante rebellione* was found objectable by any man, tho' neither the cedent's creditor nor donatar to his escheat, but that the objection may be made *a quolibet ex populo*. Haddington, 9th February 1608, *Straiton contra* Ld. Jerwiswood. Haddington, 21st February 1611, *Earl Glencairn contra Boyd*. ---- The Lords sustained an assignation made by a rebel, because in favours of a creditor, and not quarrelled by a donatar, but by another creditor. Hope, (*Horning*) 20th November 1623, *Hamilton contra Ramsay*. ---- In a reduction at the instance of an appriser against one who had a disposition to the subject, on this ground, That the said disposition was granted posterior to the citation and executions of another apprising, of which that of the pursuer's was within year and day; after which the common debtor could do no voluntary deed to the prejudice of the pursuer's apprising, tho' the first apprising was acquired by, and now stood in the person of the said assigney; the Lords found, That the pursuer had the benefit of the denunciation in the first apprising, and therefore reduced the posterior disposition. *Nota*, The author adds, that afterwards the Lords inclined to alter this interlocutor. Fountainhall, 23d January 1703, *Wilson contra Lord Saline*. ---- The magistrates of Glasgow having obtained from their Archbishop a nineteen years tack of his parsonage and vicarage teinds, for a grassum of 20000 merks, and a small tack-duty; and being charged for the grassum, the defence was, That the tack is null, as granted after a *conge deslire* was come from court for electing the setter Archbishop of St. Andrews. Answered, 'Tis *jus tertii* for the defenders to propone such a nullity, which is only competent to the succeeding Bishop of Glasgow. The Lords repelled the defence in respect of the answer. Marcus, (*Magistrates*) 26th November 1685, *Archbishop of St. Andrews contra town of Glasgow*.

K I N G.

LANDS being feued out by the king, with a clause irritant in case of alienation, a simple writ from the king empowering the feuar to alienate, not having the comptroller's consent, nor having past the seals, was found no sufficient warrant to alienate. Maitland, 17th March 1569, *Balfour contra Balfour*. Grant from the crown must pass the seals.

ALL lands within the stewartry are the king's property, and no lawful infestment can be granted but in feu, for augmentation of the king's rental; and albeit any land, which pertained heritably to any man before the lordship or stewartry came in the king's hands, and were annexed, will remain with the heritor holding of the king as he held Annexed property.

the same before ; yet the lands come in the king's hands by forfauteur recognition or resignation *ad perpetuam remanentiam*, they will become annexed property, and may not thereafter be disposed but in feu for augmentation of the king's rental ; and the possessors of all such lands will be subject to the steward's jurisdiction ; and the acceptance of an original infeftment of lands, confessing the same to be within the stewartry, will make it null, if it be granted otherwise but in feu. Haddington, 19th June 1612, Sir Robert Douglas *contra* Tushielaw.---- Annexed property cannot be alienated. Stair, 25th February 1669, king's advocate *contra* Earl Morton.

Power of
granting jurif-
dictions.

A NEW regality, neither granted nor ratified in parliament, was found to be no regality, in terms of the act 43, parl. 1455 ; and in case it refer to an anterior regality, the Lords found that it could not be sustained, unless either the old infeftment were produced, or an act of adjournal, where the same has been admitted in justice courts. Haddington, 20th January 1602, Master of Rothes *contra* prior of St. Columb.

Power of
revocation.

THE king's perfect age was found to be 21 years complete, so that whatever is done by him after that age comes not under the general revocation. Maitland, 28th May 1557, the queen's grace and her comptroller *contra* Hamilton.---- The king's revocation was found not to be extended to acts of parliament made in his majesty's minority, unless they be expressly mentioned in the revocation. Haddington, 11th July 1622, Earl Rothes *contra* Gordon.

Not to be
prejudged by
neglect of his
officers.

THE king by his advocate having compeared at a service, and consented thereto, and done several other deeds of homologation thereof afterwards, nevertheless a reduction of the retour was thereafter sustained at his majesty's instance, after better information, because the wrong information and omission of the officers ought not to prejudice his majesty. Durie, 22d March 1633, the king's majesty *contra* Earl Strathern.---- Where the king is pursuer, it was found, That no protestation for not insisting can be granted to the defender. Balfour, (*Defender*) 16th December 1528, the king *contra* Graham.---- It was carried, by a narrow plurality, upon the 14th act, parl. 1600, That *competent and omitted* does not bar the king from challenging decreets obtained against him. Fountainhall, 2d February 1698, king's advocate and officers of state *contra* Sir Thomas Kennedy.---- In a charter from the crown, teinds being thrown in *per incuriam*, which did not belong to the king at that time, the *jus superveniens* was not found to take place, tho' these teinds came afterwards to be in the hands of the crown by the abolition of episcopacy ; because the king is not presum'd to gift what he has not, and cannot be hurt by the neglect of his officers ; upon which footing a posterior tack of these teinds from the crown was preferred. Fountainhall, 25th January 1694, Earl of Leven *contra* Countess of Weemyss.

King's pri-
vilege as cre-
ditor.

IN a competition betwixt the commissioners of excise in behalf of the crown, and some of the personal creditors of the Earl of Northesk, about certain bygone rents in the tenants hands, the commissioners insisted for preference, because they commenced their suit before any of the

the other creditors obtained decret, according to statute 33, Henry VIII, cap. 39, § 25, whereby it is provided, *That the king shall have first execution for any debt due to the crown, against any defendant, before any other person; so always, that the king's suit be taken and commenced, or process awarded for the said debt, before judgment given for the said other person*; the Lords preferred the commissioners.

January 1724, competition betwixt the commissioners of excise and creditors of the Earl of Northesk.---- A possessory judgment is not competent against the king. Stair, 28th January 1679, Ld. of Blair *contra* Lady Hallehead.

KING'S ADVOCATE.

IN a competition betwixt two rights, both connecting with the king, the Lords would not allow the advocate to concur with the one against the other, without a special warrant in writ. Stair, 20th January 1680, Earl Southesk *contra* Ld. of Melgum.---- Tho' in reductions of grants from the crown, custom has required a special warrant by a sign'd manual, yet it was found, That the king's advocate, without any special warrant, might insist in a declarator of the boundaries of the king's forrest, because this is only protecting the rights of the crown from incroachments, not cutting down the right of private parties. 25th July 1735, Earl of Breadalbene and his majesty's advocate *contra* Menzies of Culdares.---- The king's advocate cannot prosecute any action at the king's instance, tending to challenge the right of any of his majesty's subjects, without a special mandate to that effect, tho' he may give his concurrence to a process brought by one subject against another. Fountainhall, 2d February 1693, King's advocate *contra* Moncreif of Redie.

When a special warrant is requisite.

KING's advocate cannot pursue contravention of lawburrows without concurrence of the private party. Hope, (*Contravention*) 6th July 1613, Turnbull *contra* sheriff of Forrest.---- Process sustained upon the act 251, parl. 1597, at the instance of the king's advocate, without the concurrence of any private party or donatar by the king, to have it found, That the wadset-right was forfeited to the king, by reason of usurious stipulations in it, contrary to the said act. Durie, 22d January 1629, King's advocate *contra* Livingston.---- The king's advocate by himself, without any informer, may pursue an usurer for annulling his security, escheating his sum, and other penalties contained in the act of parliament against usurers. Haddington, 20th June 1610, Barclay *contra* Henderson.---- *In crimine falsi* the king's advocate may pursue *per se, ob vindictam publicam*, without the concurrence of any informer. Colvil, 19th January 1581, King's advocate *contra* .---- Found, That the king's advocate cannot pursue an impropation by himself, but must have an informer. Colvil, June 1582, King's advocate *contra* Fergusson and Somervell. Colvil, March 1584, King's advocate *contra* Forret.---- The Lords refused to sustain impropation of a writ at the instance of the king's advocate alone; the parties concerned

What crimes may be pursued without concurrence of the private party.

cerned being agreed anent it. Colvil. June 1583, King's advocate *contra* Chapman. ---- Yet the king's advocate may pursue improbation of a charter under the great seal without any informer, altho' the same lands were disposed under that seal to another. Haddington, February 1597, Ld. Thirlston *contra* Durham. ----- Found, That his majesty's advocate may undertake to improve a writ without an informer, because the king's interest is separate from that of the party; & *interest reipublicæ ne crimina maneat impunita*. Spotiswood, (*Improbation*) Chalmers *contra* Dick. ---- In a reduction and improbation, the advocate alone cannot insist for certification if the private parties interest be taken off. Stair, 6th February 1672, Murray *contra* Murray.

To what actions is the concurrence of the king's advocate requisite?

IMPROBATION cannot be pursued by way of action, without concurrence of the king's advocate. Haddington, 23d June 1610, Colt *contra* Simpson. ---- But tho' the king discharge his interest therein, the pursuer may proceed. Balfour, (*Pursuer*) 25th February 1541, the king and Sir Walter Heriot *contra* Sheriff of Fife.

If obliged to give his informer?

A PARTY upon a sign'd information, as guilty of forgery, being committed to prison by the king's advocate, and no day being fix'd for his trial, within sixty days, conform to the act of parliament, was liberated of course; thereupon he insisted against the king's advocate to exhibit the information, which the Lords found the advocate obliged to do. 28th December 1727, Steven *contra* Mr. Robert Dundas.

KING'S PALACE.

THE palace of Holyroodhouse, tho' locally within the regality of Broughton, is yet, by the royal prerogative, exempt from all regalities, and is therefore understood to be within the shire of Edinburgh. Stair, 11th January 1662, Ld. Carnagie *contra* .

K I R K.

Who must uphold the kirk?

THE Lords found, That where there is a kirk and a quire, the parson or his tacksman ought to uphold the quire and the parish the kirk; but where there is no quire, that the parson ought to uphold the third part of the kirk. Haddington, 25th June 1623, Schaw *contra* Countess of Winton. ---- The like. Durie, *penult.* November 1628, kirk of Selkirk *contra* Steuart. ---- A duty being laid on by the generality of the parishioners for repairing of a kirk, letters of horn-ing were sustained thereupon, even against such heretors as had not been present at laying on of the stent, so that the taxation was imposed

HERETORS of the landwart part of the parish of a royal burgh, were found obliged to contribute to the buying of a bell for the church; in the same proportion as for repairing the church. Durie, 15th February 1642, parish of Innerkeithing *contra* Lady Rosyth. Bell.

THE disposal of the area of the church is in the heretors, and not in the minister and kirk-session. 20th February 1739, heretors of the parish of Falkland *contra* minister and kirk-session.

FOUND, That no tack can be set of a religious house, or any pertinent thereof within the precincts. Balfour, (*Tack*) 12th March 1504, Abbot of Corfregale *contra* Hamilton. --- Found, That the mansion-house of an abbay, with the inclosures thereof, and the orchards, tho' without the wall, cannot be set in feu. Balfour, (*Feus*) 4th February 1569, the king and the abbot of Balmarino *contra* Ld. Kinnier.

A COLLEGE getting the deanry of a cathedral church mortified to them, the Lords found, nevertheless, That a tack set by the whole masters of the college was null, as wanting the consent of the chapter; because that altho' the deanry, and fruits thereof were mortified to the college, yet the dignity was not thereby extinct; for by the mortification the college came in place of the dean; and as deeds done by him before the mortification required the consent of the rest of the chapter, so was it in the present case, they having come in his place. Durie, 26th March 1629, College of Aberdeen *contra* Menzies. --- The like. Spotiswood, (*Kirk Patrimony*) 25th March 1637, College of Aberdeen *contra* Lord Fraser.

THE chapter of a convent of a collegiate church, having consisted of eight persons beside the provost, it was found, That the subscription of the chapter, how to be interposed?

ons of the major part were necessary to a tack set by them, and that the subscription of the provost, with three more, was not sufficient. Haddington, Durie, 14th March 1622, and 24th June 1623, Ld. Drumlanrick *contra* Maxwell. Found also in the above case, That neither the consent of pupils, tho' *in consilio*, nor absents forth of the country, was requisite to such tacks, tho' they bruiked their parts of the patrimony; it was likewise found, That if all the chapter were minors, none of their consents were requisite. Haddington, Durie, 14th March 1622, *inter eosdem*.

Stipendiary
cannot set a
tack to conti-
nue after his
death.

IN a competition for vicarage teinds, the incumbent minister is preferable to a person having a tack from the former minister, he having been only a stipendiary, and enjoying the vicarage by an allocation of it, as a part of his stipend, but never having had a presentation giving him right to the vicarage, *jure proprio*. Durie, 9th July 1636, tenants of Hyndwood *contra* minister of Coldingham.

Tack cannot
be set during
the currency
of a former.

THE Lords reduced a tack of teind fish, at the instance of a bishop, upon this ground, That the tack was set by his immediate predecessor, notwithstanding there was another not yet outrun set by a former bishop; so that this in question was set *a non habente potestatem*. Spottiswood, (Tack) Durie, 26th July 1631, Bishop of the Isles *contra* Schaw. And this altho' the tacksmen in the first tack was not concurring.

Tack inef-
fectual, if it has
not attained
possession be-
fore the gran-
ter's death.

HE who obtains a tack of vicarage teinds, not apprehending possession by virtue thereof before the demission of the benefice by the setter, if he who is thereafter provided, obtain peaceable possession, the tacksmen will not be able to controvert with him. Haddington, 23d January 1611, Ramsay *contra* Maxwell.

Or if set to
take place af-
ter death.

A TACK of teinds, whose entry is appointed to be at the decease of the person setter thereof, is null, as conferred *in tempus indebitum*. Haddington, 9th January 1612, Home *contra* Home. The like, Maitland, 11th June 1568, Slewmans *contra* town of Edinburgh.

Tack can-
not be set with
diminution of
the rental.

CONVERSION of victual, payable to a bishop, into money rent, was found a contravention of the act 11, parl. 1585, and the tack or other writ containing the conversion, was found reducible. Falconer, 20th March 1683, Bishop of the Isles *contra* Stewarts.

For how
long space may
tacks be set?

A TACK being set by an ecclesiastical person for all the days of the tacksmen's life, the same was found null, unless it had been duly confirmed. Balfour, (Tack) 14th December 1510, Bishop of Aberdeen *contra* Forbes. Balfour, (Tack) 12th March 1504, Abbot of Corrigale *contra* Hamilton. --- Found, That when tacks are set by kirkmen for no longer than five years, their successors in office are bound to maintain the tenants in the possession, without any new grassum, &c. Sinclair, 18th December 1541, Bishop of Aberdeen *contra* the executors of his predecessor. *Nota*, Here it was contended, that it ought only to be for three years, but the Lords found it five. --- This was again found. Maitland, 26th March 1558, parson of Muckarsie *contra* Abercrombie. --- But it was again found only to be three years in case

case of a vicar. Colvil, February 1584, vicar of Gaston *contra* Valentine. And here the tack was from three years to three years, and the tackfman had bruiked fix, and was entred into the seventh year. --- The like. Maitland, 17th December 1569, Ker *contra* Ker. Balfour, (*Tack*) 1st March 1566, Simpson *contra* Cockburn. --- A five years tack was sustained, tho' set by an ecclesiastical dignitary, without consent of the chapter or convent. Balfour, (*Tack*) 18th December 1541, Bishop of Aberdeen *contra* executors of umquhil Gavin bishop of Aberdeen. 26th March 1558, parson of Muckarsie *contra* William Abernethie. --- But with consent of the chapter or convent, the Lords found, That they may set a nineteen years tack, which will bind their successors. Balfour, (*Tack*) 25th May 1542, provost of the Queens college *contra* Ld. Balcleugh. --- A tack set by a kirkman, from three years to three years, till nineteen years should run out, was found only to subsist for three years after the setter's decease. Colvil, 17th November 1579, *contra* . --- Found, That a provostry is not a prelacy, and therefore that a tack was null, because set without consent of the patron, conform to the act 203, parl. 1594. Hope, (*Patrimony of the kirk*) 12th July 1616, Ld. Drumlanrick *contra* Couhill and others. --- Found, That a tack set by an inferior benefited person, for longer space than his life, and five years thereafter, and recorded in terms of act 4th parl. 1617, was not null, in respect that the act prohibits not tacks to be set for any longer space, which if it did simply, without adjecting a penalty, it might then infer a nullity; but seeing the act adjects a special punishment against the setter, the Lords found, That the punishment may be incurred by the contraveener, but that the tack will not fall as null. Durie, 9th November 1624, Hope *contra* parson of Craighall.

TACKS to endure during the setter's incumbency only, may be granted in what terms he has a mind; because none are prejudged thereby save the granter himself. Maitland, *ult.* February 1566, vicar of Bowtoun *contra* Cockburn. The like. Colvil, March 1583, parishoners of Cumnock *contra* Ld. Carprinton.

Tacks set during the granter's incumbency.

KIRK-LANDS being sold by a chapter, with consent of the vicar general, because the see was vacant; the sale and infeftment following thereupon, was reduced for want of the bishop's consent; because sale is a voluntary act, and the vicar general, *sede vacante*, can only consent to necessary things, and to acts of ordinary administration: And this the Lords did, notwithstanding the defender produced the king's confirmation of the charter, who, in a vacancy, is in all respects in place both of the pope and bishop; but the confirmation here was impetrated during the dependance of the process of reduction. Spotiswood, (*Kirk patrimony*) 26th April 1566, Archdeacon of Brechin *contra* Pitcairn. --- No incumbent can feu out any part of his benefice without consent of the bishop and patron. Balfour, (*Feus*) 12th December 1566, *contra* Pitcairn. 19th March 1567, Douglass parson of Douglass *contra* tenants thereof. --- Feus of kirk-lands belonging to laick patrons, need no confirmation. Haddington, 11th January 1610, Ld. Smeton Hepburn *contra* Hepburn.

Feus granted by churchmen.

THE Lord found, That a bishop, being not *dominus*, but only an *economus, dispensator, curator & administrator beneficii*, cannot change a vassal's

If they can change simple ward into fal's taxt-ward?

sal's simple ward and to taxt-ward. Home, January, Fountain-hall, 21st February, Falconer, 12th March 1684, Archbishop of St. Andrews *contra* Bethune.

Erection of
kirk-lands in-
to temporal
lordships.

AFTER suppression of the popish clergy, the custom was, That the king presented persons to the benefices, who had the title of abbots and commendators; and in all erections of benefices in temporalities, the constant method was, that these titulars demitted in the king's hands, upon which demissions the erections followed; upon this account the Lords preferred a posterior erection, being upon such a demission, to a prior erection, tho' it was argued, that the second was *a non habente potestatem*. Stair, 24th February 1666, Sinclair *contra* Ld. of Wedderburn. — Found, That the feuars of an abbacy were only liable for the feu-duties contained in the ancient feu-charters granted by the abbot to them, but not to relieve the lord of erection of any part of the blench-duty payable by him to the king, unless they had expressly burdened themselves with the said relief in their latter charters; because the lord of erection is liable for the blench-duty merely upon the account of the erection granted in his own favour, which must not prejudice the anterior vassals. Fountainhall, 10th June 1680, Earl of Panmuir and Ld. of Monimusk *contra* Menzies. — The lord of erection of church-lands, which had belonged to an abbacy, having first, by a simple disposition, transmitted them to one, and afterwards, by resignation, to another, who was thereupon infeft; he that had the first simple disposition contending, That the lords of erection, since the year 1633, are no more superiors of church-lands, but have only right to the feu-duties by reservation till they be redeemed from them, and so need no infeftment to convey them; yet the Lords, by narrow plurality, found, That the disposition alone did not convey sufficiently, and therefore preferred the infeftment tho' posterior. Fountainhall, 8th February 1699, Earl Aberdeen *contra* Forbes.

Superiority
of kirk-lands
annexed to the
crown.

A SUPERIOR of kirk-lands pursuing for feu-duties, it was objected, That by the act 9th parl. 1633, the superiorities of kirk-lands were annexed to the crown, reserving only the right to such superiors who had subscribed the general surrender; the pursuer was not found obliged to instruct, that his author did subscribe the surrender, but the same was presumed by his so bruiking the superiority. Stair, 27th June 1662, Watson *contra* Elies. — Kirk-lands being annexed to the crown by act 1633, reserving the feu-duties to the lords of erection, ay and while they be redeemed; for this reason process was not sustained at the instance of a lord of erection, insisting as superior in a reduction and improbation against vassals of kirk-lands, tho' his summons was with concurrence of the king's advocate; for in this case, the Lords thought the king's special order necessary. Stair, 24th June 1664, Ld. of Preston *contra* Ebred. Stair, Gosford, 14th January 1673, Earl of Nithsdale *contra* Feuars of Holywood. — By act 53. parl. 1661, ratifying the act 1633, annexing the superiority of kirk-lands to the crown, it is provided, "That any who have gotten or shall get any new infeftment of superiority of kirk-lands, the same shall stand good as to such vassals who have given their consent to the said right of superiority." This clause was found to reach rights of superiorities, granted any how, tho' *not legitimo modo* by dissolution, because dis-

diffolution would be valid without the vassal's consent. Stair, Gosford, 14th July 1669, Duke of Hamilton *contra* Ld. of Blackwood. --- But the single taking of infeftment from a lord of erection, was not found to import a consent to become vassal for ever, or that the vassal might not thereafter return to the king; nor was it found such a consent as is meant in the act of parliament. --- *N. B.* The consent meant in the act of parliament, is probably a consent in terms of act 33d parl. 1647. Stair, Gosford, 28th July 1669, *inter eosdem*. --- The same found tho' the vassal had taken charters from the lord of erection for the space of forty years running. Dalrymple, Forbes MS. 9th June 1714, Heriot's hospital *contra* Hepburn. --- The like. 24th January 1730, Earl Dundonald *contra* Fullerton. --- In a pursuit for nonentry of kirk-lands, holding of a subject superior, it being objected by the lord advocate for his majesty's interest, That by a clause in the close of the act 53, parl. 1661, all the king's casualties are reserved; the Lords found, That the reservation in the end of the said act of parliament, was only of the king's right of redemption of these feu-farms and casualties at nine years purchase, but not of the casualties themselves during the not redemption, for that had been *repugnans in adjecto*, and a clear contradiction to the rest of the act, &c. Fountainhall, 15th January 1686, Hope *contra* Watson. --- Found, That temple-lands are not church-lands, nor annexed to the crown by the general act of annexation 1587. Fountainhall, ult. February 1700, Ross *contra* vassals of Drém. --- Lands granted to any hospital, or *maison-dieu* are not church-lands, for this reason they were excepted from the annexation to the crown, act 29th, parl. 1587: And for the same reason they fall not under the act 10th parl. 1661, annexing the superiorities of church-lands to the crown. Marcus, (*Superiority*) March 1682, Findowie *contra* town of Brichen. --- In the reduction and improbation at the instance of the Earl of Dumfermline, as come in place of the prior of Pluscarden, against the vassals of the priory, alledged for the defenders, by the act 10th, parl. 1633, the superiority of all kirk-lands, as well those erected before the annexation 1587, as thereafter, are annexed to the crown, whereby the defenders became truly vassals to the crown; and the lords of erection have only right to the feu-duties till redemption, and so the defenders need not produce their right to the pursuer. Answered for the pursuer, The priory of Pluscarden is excepted in the annexation 1587, and erected in favours of the pursuer's predecessors; and it is not expressly comprehended in the annexation 1633. 2do, The act 53, parl. 1661, declares all persons, who consented to be vassals to the lords of erection, excluded from the benefit to hold of the king: And *ita est*, the defender's predecessor gave such a consent to the pursuer's predecessors. Replied for the defender, The act 1633 annexes all without distinction, and so includes the priory of Pluscarden. 2do, The consent mentioned in the act 1661, must be understood a consent since the act 1633, and the consent founded on by the pursuer is in *anno* 1612, when the superiority was truly vested in him, and at that time the vassals had no option, but behoved to consent. The Lords sustained the alledgeance made for the defender. Marcus, (*Superiority*) 19th July 1688, Lord Dumfermline *contra* Sir Robert Dunbar.

ALL personal services are taken away from superiors of kirk-lands by vices taken away from superiors of kirk-lands. the act 10th, parl. 1633. Stair, 27th June 1662, Watson *contra* Ellies.

Suit in pre-
ſence at the
head-court.

A PARCEL of annexed church-lands, coming by progreſs in the perſon of a nobleman, with the office of heretable bailie, the vaſſals of the barony being expreſly bound by the *reddendo* of their charters to ſuit and preſence at the three head-courts of the year; the Lords in a ſuſpenſion by one of the vaſſals, who was fin'd in L. 50 for not attending, found it relevant to make the vaſſal liable, that by the *reddendo* of his charter he was expreſly bound to give ſuit and preſence at theſe head-courts; tho', by the act of ſurrender in 1633, ſuch lands hold of the crown, and ſo they are bound to answer the ſheriff-court: Further, the Lords ſuſtained the fine, and reſused to reſtrict, becauſe it was not in the caſe of an ordinary barony. Fountainhall, 12th January 1705, Earl of Panmuir *contra* Robertſon.

ECCLESIASTICAL *pension*. See *Pension*.

KIRK-YARD.

THE Lords found, That the graſs of a kirk-yard cannot be aſſigned by the plat, but that it pertains to the pariſh, and may be ſet by them, and the duty thereof applied to pious uſes. Haddington, 25th July 1609, Ld. Baſs *contra* Young.

Læſio ultra duplum.

THE Lords reſused to reduce a nineteen years tack of kirk-lands, upon *l. 2. C. de reſcind. vend.* altho' the tack-duty was within the half of what it might or ought to give, provided only the former rental was not diminished, and found, That the ſaid *l. 2.* did not take place in Scotland, as was found in ſome former caſes. Sinclair, 25th May 1542, provost of trinity college in Edinburgh *contra* Balcleugh.

LÆSIO ultra duplum in *contracts of ſale*. See *Sale*.

LAWBURROWS.

Raiſer of
lawburrows
muſt make
faith, that he
dreads bodily
harm.

A RAISER of lawburrows not having made faith at firſt, 'twas found, That he might ſupply it when the contravention came to be diſputed. Haddington, 14th June 1612, Lord Thirleſtane *contra* Hepburn. — The contrary. Haddington, 24th July 1601, Earl Caſſils *contra* Ld. Knockdolean. Spotiſwood, (*Horning*) 1583,

con-

contra Bishoptoun. ---- It was found no nullity in a charge of lawburrows and act of cautionry following upon it, that the letters did not command the messenger to take the party's oath, that he dreaded bodily harm, and his oath was not taken; tho' it would have been a good ground of suspension, and the party charged would not have been compelled to find caution until the other had given his oath. Durie, 7th December 1627, Ld. Clackmannan *contra* Ld. Fingask.

THE Lords found, That in case the parties be poor men, such as hinds, cottars, &c. any of them may be received caution for the o-^{Caution in lawburrows.}thers. Balfour, (*Lawburrows*) 2d December 1532, Seton *contra* Balingal. --- Parties being charged to find mutual caution in lawburrows; the one having obeyed, and the other (notourly unable) making faith that he could not find caution; the Lords took him acted for the double of the sum. Haddington, 13th January 1624, Ld. Balbegno *contra* Ld. Lauriston.

A MAN charged for an exorbitant pain of lawburrows, altho', for eschewing of horning, he found caution, and thereafter contraveening, was decerned to pay that great pain, and *de facto* paid it; yet he having suspended thereafter, and craving modification for time coming, the same was allowed him. Haddington, 2d December 1609, Ld. Killspindie *contra* Learmonth. ---- The Lords found a contravention only inferr'd the half of the penalty, because the deed was not very violent, nor the party maim'd, but only a blow given. Auchinleck, (*Contravention*) 1st February 1634, Wright *contra* Clark. ---- The Lords refused to restrict the penalty in a lawburrows, which was 1000 merks, to 200, (as was pleaded, because the master was not infest, and so an unlanded gentleman) because, tho' he was not infest, he was apparent heir to a freeholder who stood infest, and so was liable to the same penalty. Fountainhall, 8th January 1712, Heriot *contra* Hamilton. ^{Penalty.}

THE Lords found, That towns and communities may be decerned to find lawburrows to private persons dreading them bodily harm. ^{Against whom may lawburrows be taken out?} Haddington, June 1594, Old town of Aberdeen *contra* New town.

CONTRAVENTION of lawburrows was sustained, altho' there was no damage done, but only the party had stopped a high-way, where carts with corn used to pass. Colvil, December 1591, Strangs *contra* Sandilands. ---- Threatning and chafing was not found to be a sufficient qualification of contravention, without actual striking. Haddington, February 1604, Wallace *contra* Ld. Haining. ---- Pasturing of goods was found not to infer contravention, unless herding were also libelled. Haddington, February 1604, Ld. Schaw *contra* Wilkieson. ---- Herding not sustained, unless it were alledged, That the goods were violently held on the ground. Hope, (*Contravention*) 5th December 1616, Anderson *contra* Galbreath. ---- Lawburrows being found, and the party thereafter having pull'd off the others hat and thrown it under his feet, and with a threatning to nail it to his head with a whinger; this was found to be no contravention, because he neither harm'd him in his person nor goods. Haddington, ^{Acts of contravention.}

21st June 1605, Young constable of Dundee *contra* Fletcher.---- Drawing a sword to invade a man, tho' no harm followed, was found sufficient to infer contravention. Haddington, 27th February 1607, M'Kie *contra* M'Kie.----In a contravention pursued by Bruce of Greenyards against Clackmannan, the libel was found relevant, because Clackmannan struck the pursuer with his fist, and drew his whinger, and struck at him therewith, albeit there was no harm done. Haddington, 21st December 1609, *contra* .----The Lords found deeds of contravention relevant, which libelled upon the defender's violent entering to the possession of the lands, after the pursuer was put in, altho' it should fall out that the defenders should reduce the decreet of removing. Hope, (*Contravention*) 6th July 1616, Muirhead *contra* Ld. Barfcobie.---Injurious words and spitting in the face was found contravention. Auchinleck, (*Contravention*) 23d January 1629, *contra* .---Found, That the letting in water to the pursuer's going coal, through the defender's that was wasted, was no act of contravention, but the pursuer was allowed to insist for damage and interest, if he had sustained any. Spotiswood, (*Contravention*) 3d February 1629, Anderson *contra* Blackwood.---A deed of contravention was sustained, altho' there was no violence libelled, the deed being the liferentrix her tilling up land that was found to be no part of her jointure, and after the pursuer had sown it she had caused sow it over again. Durie, 13th December 1631, Ld. Whitingham *contra* the Lady.---The Lords refused to sustain contravention upon this, That the defender had taken two horses from the pursuer's tenant, since caution was not found to the tenant, nor was he insisting here, but might by himself pursue a spuilzie, &c. nor was the tenor of the act here regarded, viz. That the pursuer, his men, tenants, &c. should be harmless, &c. seeing that was only the stile of court. Durie, Auchinleck, (*Contravention*) 28th January 1632, Grant *contra* Grant.---The like. Durie, 9th February 1633, Lindsay *contra* Denniston.

Action of
contravention
how under-
stood past
from?

RECONCILIATION of parties was found not to take away action of contravention, but that the party may pursue for an injury done even before the reconciliation. Haddington, 6th February 1607, Torbreks *contra* .---A party being charged to find caution in a lawburrows, the Lords found, That altho' he contract friendship and familiarity with the charger, yet thereby the lawburrows is not presumed discharged, except it be express in writing; and in case the party had found caution and contraveened, the familiarity since the finding caution, was found no relevant exception. Auchinleck, (*Contravention*) 9th July 1628.---A deed of contravention being the cutting of some horse-loads of wood in the pursuer's property, this exception was sustained, viz. That the pursuer, after the time of the said cutting, had granted liberty to the defender to cut some wood there, which the Lords found a presumptive remission. This action being like the Roman *actio injuriarum, quæ dissimulatione tollitur*; but they reserved to the pursuer action for simple damage and interest. Durie, 11th January 1633, King's advocate and Denniston *contra* Lindsay.

LEGACY.

LEGACY.

A BOND, whereby one was obliged to leave to another 500 ^{What under-} marks, to be paid by his executor after his decease, found to ^{flood a legacy.} be a legacy affecting only the dead's part, and not a debt affecting the whole goods. Durie, 13th January 1631, Houston *contra* Houston.

A LEGACY is only payable out of the defunct's free goods. Stair, ^{Legacy pay-} 12th July 1671, Murray *contra* Murray. ---- A bond of provision ^{able out of the} granted upon death-bed, obliging the defunct, his heirs, &c. tho' it ^{free gear only.} could only take place in the dead's part, was yet found preferable to a legacy, tho' the legacy bore an obligation upon the heirs and executors to pay the same; for a legacy is only a succession, and cannot therefore compete with a *jus crediti*. Stair, 14th December 1676, Mitchel *contra* Littlejohns.

FOUND, That a legacy *ad pios usus*, being paid by the testator in his own lifetime, it ought not to suffer defalcation with the other legacies, altho' the free gear be not sufficient to pay them all. Durie, ^{Competition among legacies. And, imo, A legacy ad pias causas.} 6th July 1630, Monro *contra* Scot's executors. ---- The dead's part being exhausted by legacies, the Lords found, That a *legatum ad pias causas* must suffer proportional defalcation with the rest. Spotiswood, (Legacy) Durie, Hope, (Legacy) 6th July 1630, Monro *contra* Scot.

SPECIAL legacies are preferable, and suffer not a proportional abatement with the general legacies. Stair, ^{2do, Special legacy.} 21st July 1665, Spruel *contra* Miller. ---- Special legacies suffer not an abatement with general legacies, when left in the same writ; but, because legacies are ambulatory, a legacy was found to derogate from a former legacy. Stair, 21st July 1676, Trails *contra* Gordon.

A WIFE being provided, in her contract of marriage, to a jointure, ^{3tio, Additional jointure left as a legacy.} with power to the husband to add thereto, *etiam in articulo mortis*; and he, in testament, leaving his only son executor, and giving an additional jointure in legacy, and also leaving other legacies, which the executor alledged would exhaust the subject very much; and the wife alledging, That she was not an ordinary legatary, but a creditor, in respect of the power which the defunct had *de facto* used; the Lords found, nevertheless, That the said addition being left to her in legacy, she was in no better case than the other legataries, and had no preference in the executry. Dirleton, 7th June 1676, Ramsay *contra* Zeman.

THE Lords found, That an executor, being also universal legatary, the legacy did transmit to his nearest of kin, altho' the testament was not executed, and so there was no occasion for a dative *ad non executam*. Newbyth, 21st July 1665, Spruel *contra* Govan and Miller. The like. Durie, 2d March 1636, Melvil *contra* Lord Melvil. ^{Legacy transmits without confirmation.}

UNIVERSAL legacy derogates not from prior special destinations. See *Presumption*.

LEGACY if presum'd in satisfaction of former obligations. See *Presumption*.

LEGACY of an heretable bond. See *Quod potuit non fecit*.

LEGATUM rei alienæ. *Ibid*.

HOW legacies must be paid. See *Executor*.

IF the legatar, upon payment, must find caution to indemnify the executor at the creditors hands? See *Executor*.

LEGAL DILIGENCE.

An heretable bond, when it becomes personal, so as to be the foundation of diligence.

THE Lords refused to sustain arrestment or comprising upon a bond, because, the time of leading these diligences, the bond was heretable; and altho' there was a provision therein, That it should be lawful to charge for the principal without requisition; yet before that charge the sum remain'd heretable, and there was no personal obligation whereupon to found diligence. Hope, (*Obligation*) 14th December 1615, Mouat *contra* creditors of Richardson. Hope, (*Obligation*) Durie, 20th July 1622, Cranston *contra* Ld. of East-nisbet. Durie, 13th December 1622, Thomson *contra* Ld. of Murthill.--- Otherwise, where the bond gave the creditor liberty to ask his money without requisition, because then there needed no preceeding charge to make it moveable. Durie, *penult*. February 1623, Halyburton *contra* Ld. of Murthill's debtors. Durie, 6th March 1623, Finlayson *contra* Johnston.--- Durie, 2d March 1624, Colthard *contra* Paterfon. Durie, 4th July 1627, Edgar *contra* Finlayson. Durie, 25th January 1642, Johnston *contra* Loch. Stair, 14th January 1679, Farquharson *contra* Stewart.--- The like, tho' infestment had followed. Dirleton, 19th, Stair, 21st July 1666, Thomson *contra* M'Kittrick. Dirleton, 24th January 1677, Sinclair *contra* Home of Renton.--- And where the heretable bond bore a precise term for payment of the sum, this making a liquid debt, and personal obligation to pay, diligence by comprising was sustained thereupon, after elapsing the term, without necessity of any previous requisition or charge, which is only necessary where the personal obligation, being once done away, needs to be revived. Durie, Spotiswood, (*Obligation*) 10th July 1629, Ld. of Clackmannan *contra* Ld. Barowny. Fountainhall, 27th November 1677, Sir James Stamford *contra* Lord Gosford.--- A bond being payable upon a requisition of 40 days, adjudication found ineffectual thereupon, unless requisition was used, tho' it was pled, That a summons of adjudication was equivalent to a requisition. Stair, 11th February 1680, Gordon *contra* Hunter.--- But an adjudication having proceeded upon decreets of constitution against an apparent heir, as lawfully charged to enter heir to his predecessor for payment of principal sums, annualrents and penalties contained in his predecessor's heretable bonds, without using previous requisition in the terms of the said bonds; the Lords restricted the adjudication to a security for principal

cipal and annualrents, and refused to sustain it as a security for a fifth part more, or for the termly failzies, altho' requisition was made after the decreet of constitution, and the days thereof expired before executing the summons of adjudication, which narrated the requisition. Forbes, 3d July 1707, Duncan *contra* Scrimzeour of Kirkton. --- It being objected against an apprising led in 1655, That the requisition of the sum was made at Whitsunday, contrary to a standing law at the time, viz. act 17, parl. 1641, ordaining all requisitions of sums to be made at Candlemas and Lambmas, and no more at Whitsunday and Martinmas; which act, tho' it was rescinded by the general act rescissory in 1661, yet there is an express reservation and exception of deeds already done by virtue of those rescinded acts. The Lords considering, That this nullity was not here pleaded to annul the apprising *in totum*, but only to cut off its legal, and that it was allowed to subsist as a security for principal, annualrents, and accumulations; therefore they found this defect in the requisition sufficient to take off the legal, and keep it open and redeemable, on payment of the sums therein contained. Fountainhall, 30th November 1705, Sir William Hope *contra* Gordon.

AN apprising was sustained upon a bond, bearing this clause, *That if two terms annualrent run together unpaid, the principal sum should then be payable*, tho' there was no declarator of the failzie, seeing the not payment of the annualrent being a negative did prove itself; and the provision was not of the nature of a penal irritancy, to require declarator. Stair, 20th June 1678, Scot *contra* Falconer.

ARRESTMENT may be raised upon a bond without decreet or dependence. Durie, 5th March 1628, Binnie *contra* Rofs. Stair, 7th February 1665, Graham *contra* Bruce. --- Yet thereafter, upon serious deliberation, as in a case daily occurring, and wherein the decision would be a preparative, it was found, That a pursuit to make forthcoming, is, in effect, execution, and equivalent to poinding, seeing money being *in nominibus*, and not *in specie*, cannot otherwise be affected and poinded; and therefore, that it cannot follow but upon a decreet, and not upon an unregistred bond. Direleton, 6th December 1666, Leslie *contra* Bain. --- It being objected against a bond, whereupon an apprising was founded, That it was only registred in that jurisdiction where the creditor lived, and not where the debtor lived; the Lords considering, That, *ex officio*, they might supply defects in apprisings, to make them subsist as securities for the just interest, without the extraordinary advantages of an expired legal, and exorbitant penalties, did declare, That if the defender would restrict his whole apprising to the just interest, they would then sustain this apprising for the whole sums; otherwise, that they would reduce it *in totum*. Fountainhall, 19th, Stair, 20th July 1678, Morrice *contra* Orrock.

DECREET was given against the executors of a cautioner for a curator, altho' the curator was not fully discussed by legal execution against his person, lands, and goods; but execution was superseded against the executors until the curator should be fully discussed. Durie, 20th November 1627, Rollock Finlay's relict *contra* Corrbies. --- An executor and his cautioner being pursued together by the children of the defunct,

Purification of a conditional debt, so as to be the foundation of diligence.

Diligence, in what cases it can be raised, without intervention of a decreet of registration?

Process against a cautioner before the principal be discussed.

defunct, for compt and payment of their share of the executry, that branch of the libel, *To accompt*, was sustained directly against both, superseding all execution against the cautioner till the executor should be discussed. Stair, 2d December 1662, Douglass *contra* Lindsay.---The like was found in the case of the nearest of kin, who were allowed to insist against the executor confirmed and his cautioner to accompt for the moveables, and against the clerk of the commissary court for admitting insufficient caution, all in one process; suspending always execution until discussion of those primarily liable. 1st July 1737, Ladies Margaret and Dorothea Primroses *contra* the commissary clerks of Edinburgh.--- Altho' the heir of line must be discussed before the heir of tailzie, yet they may both be conveyed to hear and see a bond registered against them as heirs, tho' execution cannot pass against the heir of tailzie till the other be discussed. Spotiswood, (*Heir*) 13th July 1626, Edgar *contra* Craigmillar. Auchinleck (*Air*) 12th February 1630, creditors of Fairly *contra* heirs.

Process before the term of payment.

SUMMONS raised before the term of payment, tho' the term be past before sentence, is null, yet process of mails and duties being raised in December, the Lords sustained the same for that current year, altho' it was before Candlemas, which is the term of payment, because the same might be unwarrantably insisted for at any time after the legal terms of Whitsunday and Martinmas were past, the decret expressely containing, that the defenders should only be decerned to pay after Candlemas was past. Durie, 5th February 1624, Wood *contra* Waddel.---No action to poind the ground till a term's duty be owing, and the term bypast. Durie, 2d July 1625, Ld. Raploch *contra* tenants.---Summons of poinding the ground sustained, tho' executed before the first term of the annuity was due, it concluding only payment to be made after the term. Durie, 26th June 1628, Lady Ednem *contra* heir thereof.--- Found, That a decret for poinding the ground may be obtained before the term of payment, superseding execution till after the term. Gilmour, February 1662, Douglass *contra* tenants of Kinglassie.--- Process of removing may be pursued before the term. Stair, 16th June 1681, Lady Chatto *contra* Halyburton.--- When a debt is arrested before the term of payment, forthcoming is also allowed, suspending always execution till elapsing the term. Hope, (*Arrestment*) Earl of Melros *contra* his tenants.---- Process of forthcoming not sustained, being before the term of payment of the debt owing by the arrestee to the common debtor, tho' the pursuer offered to delay execution till the day of payment should come. Haddington, 16th June 1610, Davidson *contra* M'Cubin.--- The like. Haddington, 6th March 1612, *contra* .---- A decret of forthcoming, at the instance of an arrester, was sustained, tho' given before the term of payment of the sum arrested, the execution being superseded till after the term. Durie, 21st February 1624, Brown *contra* Johnston. Durie, 3d July 1628, Scot *contra* Ld. Drumlanrick.

Horning before incurring the failzie.

HORNING sustained, whereof the letters were raised before the term of payment, seeing they bore to charge the obligant to pay when the term should be past. Durie, 17th December 1623, Earl Galloway *contra* Vanse.--- Found, That tho' a decret of thirlage was only declaratoria

claratoria juris, yet that the pursuer might charge the party with horn-to grind his corns, pay the multures at convenient times, &c. and if the pursuer should execute these charges maliciously, the Lords declared, That, in a suspension, they would have regard to expences; tho' it was argued for the suspender, That in case the decret should be contravened, the proper remedy was an action for abstracted multures. Durie, 29th July 1634, Ld. Innerwick *contra* Hamilton.

ARRESTMENT will not be sustained laid on before the term of payment of the debt, which is the foundation of the arrestment, unless in security, where the debtor is *vergens ad inopiam*. Stair, 17th July 1678, Ld. Pitmedden *contra* Paterfons. Home, 27th February 1728, Meres *contra* York-building company. --- In a competition amongst arresters, an arrestment founded upon an annuity, and bearing to be for payment of bygones, and for security in time coming, was found preferable according to its date, not only for all the terms aliments due when the arrestment was laid on, but also for those that were due at the time of the competition. It was argued against this, That an arrestment upon an obligation, having *tractum futuri temporis*, can have no further effect than for what was actually due when it was laid on. It was on the other hand pled, That this rule suffers an exception, in case of the debtor's insolvency, which was the case here; and there arrestments in security are as allowable as adjudications in security. *N. B.* The annuity here was run out before the competition, so that in effect there is nothing in this decision but what is comprehended in the general rule about the preference of arrestments laid down in Home's decisions, No. 100, unless it be that when the debtor is *vergens ad inopiam*, arrestment may be not only founded upon a debt before the term of payment, *ubi dies cessit*, but also for security of future annuities *ubi dies nec cessit, nec venit*. But it came not to be determined, whether the arrestment in security could screen the subject from posterior arresters, not only for payment of bygones for which there was *parata executio* at the time of the competition, but also for security in time coming of the annuities as they should fall due, which indeed is the important question. 31st January 1731, creditors of Patrick Bar *contra* his relict. --- In a competition betwixt two arresters of a sum that was liferented, to which there was no access till after the liferenter's death; the first arrestment being founded upon a bond bearing annual-rent, was found to be a security for the subsequent annualrents as well as those due before the arrestment. Fountainhall, 9th February 1705, Coning *contra* Cowan. --- The like. Durie, 20th March 1633, Simson *contra* White. --A creditor having obtained a decret of constitution, with an additional sum in name of expences, an arrestment laid on by him during the dependence, was not found entitled to draw in the forthcoming any part of the expence laid out after the date of the arrestment: For an arrestment cannot be effectual to secure a debt that is not existing at the date thereof; and the expence of process, laid out after the date of the arrestment, could not be a debt at the time of the arrestment; and even then, as they were only due *officio judicis*, they became only a debt from the date of the modification. July 1733. Wallace *contra* creditors of Robertson.

Arrestment
upon a debt *in
diem.*

Adjudicati-
on upon a debt
in diem.

A COMPRISING was reduced, because the lands were denounced before the term of payment, tho' the comprising was not led till it was past. Durie, *penult.* July 1623, Nicolson *contra* Baillie and Whitlaw. --- It being objected against a party seeking to adjudge by others who had already adjudged the subject, that as to a moiety of his sum his adjudication could not pass, because the term of payment was not yet come, an adjudication being *processus executorialis*; the Lords found they could not, even *periculo petentis*, allow the adjudication to go for that part of the debt whereof the term of payment was not yet come. Fountainhall, 18th July 1699, Chalmers and Cunningham *contra* the other creditors of Shaw. --- In a question, Whether a creditor in a bond, whereof the term of payment was suspended till after the debtor's death, might in the *interim* raise adjudication of the debtor's lands for security of his money; the Lords thought, That there could be no general rule for this case, for if there was no hazard of dilapidation, it was not to be allowed; but in the present case, it being expressly informed, that the debtor was *vergens ad inopiam*, and his circumstances much worse than when he granted the bond; therefore they remitted to the Ordinary to take what evidence he could get of his condition; and if he found it dubious, then to adjudge, unless the debtor offered sufficient caution to pay the debt when the term of payment should come; on which offer the adjudication was to stop, just as arrestments attaching bonds whereof the term is not come, or founded upon such bonds, may be loosed upon caution. Forbes, 12th, Fountainhall, 14th July 1711, Blaw *contra* Blaw: --- The Ld. of Easter-Ogle being bankrupt, it was found, That adjudication in security might proceed upon the daughter's bond of provision, tho' the term of payment was not till her age of eighteen, ten years after the competition. Home 24th January 1724, Lyon *contra* Easter-Ogle's creditors.

Inhibition
upon a debt in
diem.

AN inhibition served against the tenant upon his tack, will be a sufficient ground to reduce a wadset given by the tenant of a tenement belonging in property to himself, albeit there was nothing resting of the tack-duty the time of the alienation. Haddington, Hope, (*Inhibition*) 19th March 1622, Napier *contra* Lithgow.

Arrestment
upon a depen-
dence.

AN arrestment laid on before the summons was executed, was found null and unwarrantable; because there is no proper dependence until the summons be executed. Fountainhall, 4th December 1711, Bangour and his tutors plaintiffs. --- The like. Forbes, 19th, Fountainhall, 30th July 1706, Elphinston *contra* creditors of Strichen. --- A party having protested for remedy of law against a sentence of the Lords, and thereupon raised a summons of reduction of their decret before the parliament, conform to the act 2, parl. 1695, and upon that taking out letters of arrestment, and arresting the other party's money on the dependence, upon pretence, That arrestment on a depending process is a diligence allowed to all the subjects, and if there were a reduction of this decret of the Lords raised before their Lordships themselves, parties might both inhibit and arrest, and therefore also here: The Lords thought that there was a disparity, because they could loose arrestments laid on upon summons before themselves, but not where the action is commenced before the parliament, and so a party's debt might perish during the long recesses of that high court; and if

if this practice were allowed, it might render insignificant most of the session's decreets, since every one would enter his protest and raise summons, and thereon arrest and inhibit, which might continue many years before it were got discussed; therefore they declared the arrestment null, and ordained the writer of it to be cited before them, in order to a reprimand for introducing such a stile never before attempted. Fountainhall, 22d July 1699, Mrs. Martha Temple *contra* Ruthvens, — N. B. The Lords even refused an arrestment on a dependence before themselves, the dependence being a reduction of a decreet *in foro*. Dirleton, 4th February 1675, *contra*.

IN a competition it was objected against an inhibition, That the summonses were not executed when the inhibition was raised, and therefore the inhibition was null, not having been taken out upon a dependence, seeing to make a depending process, it is necessary that the summons be executed. Answered, The inhibition was not executed till after the summonses were executed. Reply'd, The very letters of inhibition presuppose an executed summons and dependence, without which they cannot be warrantably taken out, which is clear from these words of the letters, *as the summons duly executed bears*, and from the deliverance on the bill of inhibition, sign'd by the Lord ordinary on the bills, *viz. Because the Lords have seen the dependence*. The Lords sustained the objection. December 1726, competition, Fergusson *contra* Wilson. — The like. Bruce, 22d, Dalrymple, 26th November 1714, Creditors of Rosehill *contra* creditors of Thomson. See Stair, 12th January 1665, Neilson *contra*. — It being instructed, That a summons was blank many years after raising inhibition on the dependence, and that the summons had only been filled up of late; the Lords reduced the inhibition as wanting a sufficient warrant, but to advertise the lieges of their hazard, they resolved to make an act of federunt, That inhibitions served upon dependencies shall ingross the tenor of the summons, else they shall not be sustained. Fountainhall, 27th December 1698, Miln and Hamilton *contra* Cockburn.

IN a reduction *ex capite inhibitionis*, the bond, which was the ground thereof, not being a liquid obligation for a precise sum, but only to pay such a sum after compt and reckoning, as should be found truly resting of the same, and the computing to be by a day now elapsed; the Lords found, That this could not stop the taking a term in the reduction, but that it could have no effect till the compt and reckoning were finished, if the defender offered to prove that the sum was satisfied in whole or in part, and craved to compt and reckon thereupon, and that the inhibition would subsist as good for all that should be found due on the balance and event of the accompt. Fountainhall, 4th December 1695, Martin *contra* Scot.

AN inhibition being served upon an obligation to warrant, the Lords sustained a reduction thereupon, tho' there was neither decreet of eviction nor liquidation of distress, the pursuit being only declaratory, and the decreet to be only effectual after eviction and liquidation. Dirleton, 11th December 1667, Hog *contra* Countess of Home. — Inhibition being served on a bond conditional, not to be paid but

upon the creditor's doing a deed, whereupon decret was given for an abatement of the sum in the bond as damage and interest, the fact being found imprestable; the Lords found, That the said decret purified the condition, and therefore that the inhibition should stand good for the rest that was decerned; and this against a creditor of the common debtor's, tho' his debt was prior to the decret, but he had done no diligence before the inhibition. Gosford, 8th July 1670, Hamilton *contra* Hay. --- An inhibition upon a conditional debt was discharged by the Lords, in respect there was no present just reason for inhibiting. Forbes, 17th July 1713, Weir *contra* Deuchar. --- As the brewers without the liberties of Edinburgh, are, by the statute, subject to the impost of two penies on the pint, only with respect to ale imported into the town, this occasioned a great expence to the tacksmen of the town's impost, being obliged to have waiters at all the avenues leading to the town for collecting this duty; to save this expence the tacksmen were in use to bargain with these brewers to subject themselves to an impost for the whole ale brewed by them, as it should be made out by the excise-books; and to move them to this agreement, generally the one half of the impost was given down due upon imported ale. Upon one of these contracts Thomas Anderson brewer was charged with horning, to make payment of seven pence for every barrel of ale he should brew during the currency of the obligation, and upon the same contract was thereafter inhibited. Thomas Anderson becoming at last insolvent, in a competition, the Lords found the horning and inhibition null, *quoad* the impost arising due after their date, and that they could be the foundation of no preference against the other creditors. It was allowed, That diligence may be done upon an obligation *in diem*, or even upon a conditional obligation, if the debtor is *vergens*. In conditional obligations the debtor is bound upon existence of the condition, and he has no power in the mean time to liberate himself; a debtor *in diem* is bound in the most proper sense, tho' instant demand cannot be made: But the present is neither one nor other. An obligation to pay a certain duty, in case one chooses to brew, depends entirely upon the will of the debtor, whether there shall be any thing due or not, and therefore 'tis no obligation at all. It might as well be maintain'd, That the brewers within the town might be directly attacked with horning and inhibition upon the statute, for payment of the duty arising upon whatever they should brew thereafter. 28th November 1734, Dickie *contra* creditors of Thomas Anderson.

Inhibition
upon a negative
obligation.

THE father infesting his son in lands, yet getting bond from his son to suffer him to possess during his life, inhibition upon this bond was found effectual against a purchaser of lands from the son. Haddington, 27th November 1611, Hamilton *contra* Brisbane.

DILIGENCE upon a bond of relief. See Cautioner.

LEGITIM.

LEGITIM.

THE Lords found, That a widow's testament receives no division, altho' she have children, because no bairns part belongs to them by their mother's decease, but if that she decease intestate, they become her executors; and that upon a married woman's decease, altho' the form of the testament receives a tripartite division, yet in effect the goods divide in two parts only, because two parts belong to the husband, and her executors have only the third, but no part belongs to the children as such. Haddington, 18th December 1606, Home *contra* Christie. --- Legitim is only of the father's means, not of the mother's, and therefore a woman's children have only right to her moveables *qua* nearest of kin, whence it is, that they transmit nothing before confirmation. Stair, 17th February 1663, Forsyth *contra* Paton. Durie, 30th January 1622, Paterfon *contra* Hope and Dougal.

THE husband's children of a former marriage come in with the wife's executors to make a tripartite division. Durie, 18th July 1634, Henderfons *contra* Sanders. Durie, 17th June 1631, Chapman *contra* Gibson.

IN an action at the instance of the defunct's only child against the relict executrix, the Lords found, That altho' the heir be excluded from the executry, when there are other children; yet, when there are no other, he is a bairn, & *facit partem in testamento*; and therefore that here there behoved to be a tripartite division of the executry. Nicolson, (*Executor*) 15th July 1622, Kennedy *contra* his father's relict. --- The like. Stair, 12th January 1681, Trotter *contra* Rothead. --- A gentleman posselt of a land-estate, made a disposition, *mortis causa*, of his moveables, which, after his decease, being quarrelled by his son, who was his only child, as in defraud of his legitim, it was answered, That legitim is the portion allotted by law to the younger children, otherwise unprovided, to which the heir can have no claim, as being provided by law to the heretage. The Lords found the pursuer entitled to a legitim, and reduced the disposition, in so far as prejudicial thereto. What weighed with the Lords were these considerations, 1^{mo}, That the younger children have their succession in the moveables, *viz.* the dead's part, as the heir has his in the heretage; and the legitim is a separate portion which the law gives to the children *proprio jure*. 2^{do}, The heir is entitled to a legitim, otherwise the testament behoved to be bipartite, and the relict get the half, where there are no other children; neither could he have any claim to draw a share of the moveables upon collating with the younger children, more than they have to draw a share of the heretage upon collating with him. 3^{tio}, At any rate he may draw a share of the moveables; the only question is, If he is bound to collate his heretage with the disponsee, and the answer is, That collation is a privilege personal and peculiar to younger children, which the relict has not, and as little foundation is there for the disponsee to have. 10th November 1737, Justice *contra* his father's disponsees.

Children
have right to
the legitim
proprio jure,
without con-
firmation.

CHILDREN surviving their father, transmit their legitim to their nearest of kin, tho' they die without confirmation. Fountainhall, 12th March 1686, *Zeaman contra Zeaman*. Marcus, (*Executry*) February 1687, *inter eosdem*. Marcus, (*Executry*) 8th December 1687, *Ruffels contra Brown*. ---- And therefore where the husband at his decease had children alive, the wife can only get the third of the defunct's goods, altho' the children should decease before confirmation of the said defunct's testament. Haddington, 24th February 1607, *Stevenson contra Fisher*. --- The like in the case of a posthumous child, who lived but one day. Durie, 19th July 1623, *Sibbald contra procurator fiscal of St. Andrews*.--- A child, without necessity of confirming, may pursue a reduction of a deathbed-deed, granted to the disappointment of the legitim. Marcus, (*Lectus ægritudinis*) November 1681, *Janet Goodale contra Livingston*.

Forisfamili-
ation.

IF children be forisfamiliat, they can have no bairns part of gear, but a bipartite division must be made betwixt the relict and the dead's part. Balfour (*Testament*) 23d February 1561, *Hamilton contra Wallace* ---- Forisfamiliation of a daughter by marriage, found not to prejudice her portion natural, unless discharged by her, albeit she got a tocher, which only obliged her to collate with the other children. Home, November, Marcus, (*Executry*) 8th December 1687, *Ruffels contra Brown*. ---- The like, where the question was betwixt the daughter and the relict. 11th December 1719, *Lady Balmain contra Lady Glenfarquhar*.

Renouncia-
tion of the le-
gitim, what ef-
fect it has.

A BOND of provision being granted to a child in satisfaction of a legitim, the bairns part goes wholly to the other children, and no part to the heir or executor, who are burdened with payment of the bond. Stair, 17th February 1671, *M'Gill contra Viscount of Oxenford*. ---- Bonds of provision by a father to his younger children, bearing in satisfaction of their bairns part, and with payment of which the heir was expressly burdened, were found to give the father only *facultatem testandi* upon the childrens third, as well as his own part of the moveables, and therefore he dying, without leaving their third in legacy, it was found not to fall to the heir who had confirmed himself executor dative, but that it returned to themselves as nearest of kin, for which, as also for their bonds of provision, they might pursue the heir executor. Gosford, 19th July 1672, *Chisholm contra Chisholm*. ---- A daughter, in her contract of marriage, accepting of a tocher, and granting a renunciation of all she could ask or crave through her father's decease, and her brother, the only other child, seeking to be confirmed executor after the father's decease; Objected for the sister, That he cannot be both heir and executor; that the office is hers, and a renunciation cannot bar her, unless there were other younger children, but must fall back to herself as part of her father's moveables. The Lords found she ought to be reputed as out of the field, and the sole office and benefit accresced to the brother. Fountainhall, 4th December 1694, *Fowbester contra* . ---- Claud Henderson had a son and three daughters, the eldest, in her contract of marriage, accepted a provision in satisfaction; the son obtained a general disposition from his father of all his effects, with the burden of certain provisions to the two youngest daughters: After the father's decease, the second

second daughter ratified the disposition to her brother, accepted of her provision, and renounced any claim she had of legitim; the youngest neglected her provision, and took herself to her claim of legitim: The Lords found, That the eldest daughter being forisfamiliar before the father's decease, the brother could claim no share nor interest in the legitim upon her account, and that the second daughter not being forisfamiliar the time of the father's decease, had right to a share of the legitim, and did, by her ratification and renunciation, communicate her share to her brother. June 1728, Marion Henderson *contra* David Henderson.

THE wife accepting a conventional instead of her legal provision, the moveables receive a bipartite division betwixt the legitim and dead's part, equally, as if she were removed by death. Home, 18th January 1726, Nisbets *contra* Nisbet. --- The like. Marcus, (*Executry*) January 1685, Borthwick of Cruckston *contra* his mother.

If the wife renounce her interest.

IN a reduction of a disposition, made by the father of his moveables to one of his sons, on this reason, that it was truly of a testamentary nature, tho' executed *in liege poustie*, and so could not prejudice the pursuer, another son, of his legitim; for it bore, not only a power to alter, but an obligation upon the disponent to consent to any deeds the father should make thereof, which plainly made it a *donatio mortis causa*. The Lords considered the father was best judge of the distribution of his means, and therefore sustained the disposition. Fountainhall, 12th January 1697, Johnston *contra* Johnston. --- A disposition by a husband to his wife of the stocking that should be upon his mains the time of his decease, being quarrelled by his children as in prejudice of their legitim, being of a testamentary nature, revocable as not having been a delivered evident; it was answered, That the form of the disposition is *per modum actus inter vivos*, whereby a present right is conveyed, tho' suspended till the granter's death, and being done *in liege poustie*, it cannot be reached by the law of deathbed, and there lies no other bar to the father's power of alienation. 2do, This is a rational deed, an additional provision to a wife, and not of that nature as to admit of a construction that it was intended to disappoint the children of their legitim. The Lords found the goods disposed belonged to the lady *tanquam præcipuum*. 18th January 1721, Lady Balmain *contra* Graham. --- Claud Henderson merchant in Glasgow, having a son and three daughters, made a disposition of his whole heretable and moveable estate to his son, "in case it should happen him to depart this life before his said son;" and in this deed he nominates his son his sole executor and universal legatar, and impowers him to procure himself served heir of line in special and in general, and to obtain himself executor decerned and confirmed. Of the same date he grants competent bonds of provision to his daughters, which he declares "should be in full satisfaction of all they could claim by his decease." This settlement being challenged by one of the daughters, as in prejudice of her legitim, which she claimed, neglecting her bond of provision; it was pleaded for her, That tho' a father has greater powers than any other administrator or trustee, and may dispose of the moveables in communion upon every rational occasion; yet to testate upon his wife or childrens share of the moveables, is dropping his character of administrator,

Legitim, how far subject to the father's power of disposal?

nistrator, and assuming that of absolute proprietor. The Lords found the pursuer entitled to her legitim. Home, February 1728, Henderson *contra* Henderson. --- A man in his testament having named an only child his executrix and universal legatrix, with a substitution to another in case of her decease, and the executrix dying an infant, the substitution was found to take place; but then it was pleaded for the nearest of kin of the defunct executrix, That she was entitled to a legitim, which the father could neither disappoint her of, nor settle in any other manner than the law directs; for tho' by the Roman law the *patria potestas* went so far, that a father could make a testament for his child dying in pupillarity, no such power obtains with us. The Lords found the substitution could only reach the dead's part, and that the bairns part belonged to the nearest of kin of the defunct executrix; and that the *pupillaris substitutio* hath no place with us. Stair, 13th July 1681, Christie *contra* Christie.

In a contract of marriage, the conquest being provided to the heirs and bairns of the marriage, and the father having exercised his power of division, one of the daughters to whom a small share was provided, insisted for her legitim, contending, it was not in her father's power to provide even expressly, far less by implication, that his moveables should not be subjected to a claim of legitim. It was answered, That the legitim was cut off by the contract of marriage, providing the conquest to the bairns of the marriage; and when the moveables are once established upon that footing, the father's power of division follows of course. This brought on the question, If the legitim could be set aside, even in a contract of marriage. The Lords found, That by the provisions in the contract of marriage, and settlements made by the father, the pursuer was excluded from any claim of legitim. And the reasons were, A man who has no wife or children, may dispose upon his moveables without restraint, why not in a contract of marriage, as well as in any other deed? *2do*, The terms of the contract are the conditions upon which the marriage follows, and the children procreated; upon these conditions they are brought into existence, and they can claim no legal benefit by their existence, inconsistent with these conditions. 17th June 1732, Stirling of Glorat *contra* Lukes.

WIFE's legal share, how far subject to the husband's power of disposal? See Husband and Wife.

IF a child drawing a legitim, is bound to collate. See Collation.

LETTER OF CREDIT.

HOME of Kames wrote a letter to his brother at London, allowing him credit upon Fowlis or Elliot for L. 30 Sterling; Fowlis advanced the money, drew a bill, and got payment; thereafter Elliot upon the faith of the same letter, which had not been given up to Fowlis, advanced a part of the sum, and took the letter of credit for more security; the Lords found Kames liable, for having paid Fowlis without

without getting up his letter of credit, he plainly ran the hazard of paying over again to Elliot. Forbes, 26th July 1705, Elliot *contra* Home.

ANDREW BURNET wrote to his correspondent in London, desiring him to honour his brother Thomas Burnet's bills, and that he should put provisions in his hands for satisfying thereof; this letter was only found to bind the subscriber for such of his brother's bills, accepted and paid by the correspondent, as were notified to him in due time before his brother's bankruptcy. Stair, Fountainhall, 7th January 1681, Ewing *contra* Burnet. --- A party that advances money upon a letter of credit, must duly, as in the case of bills, intimate to the writer of the letter, that he has not got payment of the money advanced upon the faith of the letter, otherwise he is not entitled to recourse. This was in the case of an inland letter of credit. 30th November 1731, Earl of Dundonald *contra* Watson.

LETTERS OF OPEN DOORS.

A WARRANT for open doors should not be granted immediately upon sentence, or of course upon registration of a bond in an inferior court, but only a precept of poinding at first, and upon an execution returned, that no goods can be found, then letters of open doors may be granted. Durie, 7th December 1630, Dick *contra* Lands.

LETTERS OF SUPPLEMENT.

SUMMONS, intimations, requisitions, denunciations, arrestments, &c. against parties out of the country, must be executed at the mercat-cross of Edinburgh, pier and shore of Leith, in virtue of letters of supplement from the Lords. Stair, 20th January 1665, Lord Lour *contra* . --- The like. Fountainhall, 4th July 1701, Carmichael *contra* Bartram. --- A requisition at the mercat-cross found null, not being by letters of supplement from the Lords. Stair, 15th June 1680 Gordon *contra* Earl of Queensberry.

ONE sheriff cannot grant letters of supplement to another for citing and examining witnesses within his jurisdiction. Forbes, 30th July 1712, Gordon *contra* Gordon.

IN a process before the sheriff upon a contract, wherein several parties were bound, comparance was made for one of the defenders, and a declinator offered, that he was not subject to the jurisdiction of the sheriff, he living in another shire. The sheriff *ob contingentiam causæ*, appointed him to be cited by letters of supplement, and that being done, decerned against him; in a suspension of this decret, the Lords found it intrinsically null, as pronounced against one not subject to the sheriff's jurisdiction, nor was this defect supplied by the letters of supplement; the

Lords may assist inferior judges in explicating their jurisdiction, but they cannot give them any new jurisdiction. January 1731, Blackwood *contra* Halyday. — An inferior judge was found competent to a transumpt, altho' the party called as defender was not within his jurisdiction, being cited by letters of supplement from the Lords. Spotiswood, (*Transumpt*) Colvil, June 1589, Seton *contra* Ld. St. Monans.

LIFERENTER.

Liferent-right of lands what is comprehended therein? And *1mo*, If it carries a right to cut woods?

A LADY conjunct-fiar, infest in the lands *cum, sylvis nemoribus, &c.* in the tenendas, may cut woods, tho' not infest therein *per expressum*. Haddington, 10th January 1610, Lady Gaitgirth *contra* Hunter. — A lady being infest *cum sylvis* in a liferent, the Lords found, That it gave her interest to interrupt the heretors cutting *in ipso initio*, till a portion should be set apart for her liferent-use, and ordained a cognition of the wood to be taken, and a part set aside for repairing her houses, &c. Fountainhall, 16th July 1680, Stamfield *contra* Wilson and Earl Queensberry. — A conjunct-fiar cannot cut woods for selling, tho' he may for necessary use. Falconer, 28th March 1683, Earl Dumfermline *contra* Earl Callendar. — A lady liferentrix, when the estate was going to a publick roup, craving power to cut as much of the timber belonging to her liferented lands as would repair and uphold the houses on the ground; the Lords found, That she had no right to cut any part of the woods, tho' to the use of the ground, but that she and the tenants ought to uphold them upon their own expenses. Fountainhall, 3d July 1696, Lady Borthwick supplicant.

2do, Coal.

A LIFERENTER was found to have no right to a going coal, which was in use to be sold to the country before the liferent was granted, much less if it had begun to be wrought after. Stair, Gosford, 13th July 1677, Lady Preston *contra* Ld. Preston. — Found, That terce is only due of the profits of lands above ground, and that the lady tercer has no right to the profits of a coal, nor any thing below ground, but in so far as is needful for her own use; and that she cannot break the ground to work coal and sell it to others, nor can partake of any profit gotten thereby. Spotiswood, (*Terce*) Hope, (*Liferent*) Durie, 14th February 1628, Lady Lammington *contra* her son.

3tio, Power to hold courts.

A RELICT conjunct-fiar has no power to hold courts, altho' it be a regality. Balfour, (*Regality*) 20th April 1553, Earl of Morton *contra* Lady Morton. — A Lady being infest in her conjunct-fee-lands, holding of the king *cum curiis*, the Lords found, That the fiar cannot hold courts for bloods upon the said lands during her lifetime. Haddington, 4th March 1609, Lady Mochrum *contra* Ld. Mochrum. — Lands erected into a barony, being liferented by a lady as her jointure; the Lords found, That she had right also to the jurisdiction of regality within the bounds of her liferent-lands. Fountainhall, 26th January 1700, M. Douglass *contra* Countess of Sutherland.

Liferent by reservation.

A MAN being infest in a barony, with reservation of his father's liferent *cum tenentibus, tenendriis, & libere tenentium servitiis*; the entry of

of the free tenants or feuars was found to belong to the liferenter, and sasines given by the *fiar vivo patre* were found null. Haddington, 13th December 1596, Clark *contra* Weemyss. --- A liferenter by reservation was found to have power to enter the heirs of his vassals, but not to receive strangers, nor change the vassals or free tenants, nor to set tacks or rentals for longer than his lifetime. Haddington, 11th January 1611, Lady Crawfordjohn *contra* Ld. Glaspen. --- A father reserved liferenter, is bound to keep the superior's head-courts, and not his son the *fiar*. Gilmour, 17th January 1663, Earl of Callendar *contra* Ruffel. --- Found, That woods were not the property of a father who had disposed the fee of his lands to his son, reserving his liferent; and that the father had only liberty to cut so much as was needful for the repairing of the houses, and could not dispose upon or sell any part, unless the wood was used formerly to be cut in yearly haggis. Marcus, (Liferents) March 1683, creditors of Mouswell *contra* the children. --- A liferenter by reservation found entitled to cut the woods upon the estate, such of them as were of the nature of *sylva cædua*, according to the custom and usage of the country where the woods grew. 8th December 1737, Ferguson *contra* Ferguson. --- A declarator of property is competent at the instance of a liferenter by reservation, tho' the *fiar* be debarred from having *personam standi in judicio* by a horning. Durie, 21st December 1633, Ld. Weym *contra* Stewart.

A SUM being payable to a husband and wife in conjunct-fee, and their heirs, &c. the wife, tho' but truly a liferentrix, was found to have power to uplift the stock, but, before extract, she was ordained to give bond for reemployment of the same to herself in liferent, and to her husband's heir in fee. Stair, 25th July 1662, Kinross *contra* Ld. of Hunt-hill. --- A sum being taken to a woman in liferent and her son in fee, the Lords found the money payable to the liferentrix, but that she could not uplift it without citing the *fiar* to see it reemployed, or caution found. Fountainhall, 30th June 1680, Jardin *contra* Homes. --- An heretable debt being made payable to one in liferent and another in fee, the Lords found the requisition to be null, because used only at the instance of the liferenter, and not of the *fiar*, altho', by the clause of requisition in the bond, the liferenter had power to uplift and reemploy for his liferent-use. Fountainhall, 17th December 1702, Ogilvie *contra* Stormonts. --- A man having taken a bond for money, payable to himself and his wife in liferent, and, failing of them by decease, to return to the debtor himself, yet bearing a term of payment of the principal sum; the Lords, in discussing a suspension of a charge for the principal sum itself, found, That the creditor had the power of uplifting, because he had interest, if the debtor were *vergens ad inopiam*, to see it better secured for his annualrents, but withal their Lordships thought, That the creditor could not frustrate and evacuate the substitution, but must reemploy the sum in the same terms as it stood in the first bond. Fountainhall, 7th November 1711, M'Intosh *contra* Ratray. --- A sum having been lent out to three debtors, payable to a woman in liferent and her son in fee, and two of the debtors having died insolvent, the liferentrix found means to get payment from the third without a process; when her son was out of the country, and lent it out again, in terms of the former bond, to a person in reputed good circumstances, who proving thereafter insolvent, the liferentrix was

Power of
uplifting life-
rented sums.

not found liable to make up the sum to the fiar, having an interest to see the money well secured, and having acted for the best. 13th July 1731, Malcolm *contra* Neilson.

Cautio usufructuaria.

THE Lords extended the act 25, parl. 1491, anent liferenters their finding caution to uphold houses, &c. to a man who had infest his son in his lands, and took from him a liferent tack of the house, mains, &c. and further in this case they extended it even to the king's donatar, who had taken a gift to the said tacksmen's escheat, and had assigned the gift to a lawful creditor of the said liferent tacksmen. Auchinleck, (*Liferenter*) 23d January 1635, Ld. Calder younger *contra* Boyd.--- A liferentrix being charged to find *cautionem usufructuariam*, and suspending upon the act of parl. 1594, cap. 226, ordaining, That first a precognition should proceed touching the state of the tenement, and offering, in terms of another clause in the said act, to cede possession, the fiar finding caution to her to pay her the mail during life; the Lords found the act 25, parl. 1491, appointing *cautionem usufructuariam*, not at all rescinded by the said act 1594; and that the clauses in the said posterior act, relating to the present case, were only contrived for decayed and ruinous lands, because such cannot be repaired by the liferentrix, nor she urged thereto. Durie, 23d March 1626, Fowles *contra* Allan. --- A liferenter without burgh may be charged by the heretor to find caution to uphold the house, without precognition, and with certification, that she shall lose her liferent of the house. Haddington, 23d June 1612, Bruce *contra* Mrs. of Sinclair.

Cui incumbit probatio of the sufficiency or insufficiency of the houses?

IN a process against the representatives of a liferentrix, founded upon the statute and common law, she having suffered the mansion-house, during her possession, to go into disrepair; the question occurred, If it was necessary for the pursuer, in order to estimate the damages, to bring a distinct proof by two witnesses of the condition of the houses at the Lady's entry, which was now become impracticable by the lapse of time; or if it was sufficient to bring a proof as far back as the memory of man could go, which must presume *retro*, unless the defender would offer to prove reparations *ab ante* bestowed by the liferentrix. The Lords found, That the pursuer must prove the condition of the mansion-house, both at the time of the liferentrix's entry, and the time of her death. 18th December 1733, Cuninghame *contra* Cuninghame.

IF the creditors of the fiar can pursue the liferenter to find cautio usufructuaria. See Personal and Transmissible.

IF liable to publick burdens. See Publick Burden.

LIS ALIBI PENDENS.

Lis pendens in a separate jurisdiction.

TAKING decret in one inferior court hinders not taking decret for the same debt in another, which is, that the pursuer may have execution in both districts. Stair, 4th February 1681, Vanlovan *contra*

contra Bruce. For this reason it is, that against a suit intended before the court of session, the exception of *lis pendens* in any of the courts of England will not be sustained. Fountainhall, 27th January 1698, Cochran *contra* Earl Buchan. Forbes, 5th July 1706, Cuninghame *contra* Lady Semple. Home, 2d January 1728, Meres *contra* York-building company. ---- But the African company, consisting partly of Scots, and partly of English members, having given commission to Elliot in London to settle accompts with the company's factors in the East-Indies, and to call for the profits; and L. 6300 being accordingly remitted to him by these factors, in a process against him before the court of session to accompt, this defence was sustained to him, That there was a process depending against him before the court of chancery, at the instance of some of the other partners of the company, calling for the said sum in order to be divided, and that, in obedience to an order of chancery, he had lodged the money in the hands of one of the masters of that court, which was implementing his commission, and equal to a discharge from the company. Bruce, 21st July 1715, Gordon *contra* Elliot.

LIS pendens *within the same jurisdiction.* See *Process.*

LITIGIOUS.

Litigious by process.

THE granter of a bond having raised reduction thereof, it was found, ^{What understood to make a *lis pendens*?} That the executing against the cedent, tho' but an hour or two before the assignation was intimated to him, the pursuer did make the subject litigious, *ad hunc effectum*, to give him the benefit of the cedent's oath against the assigney. Fountainhall, 29th June 1703, Mitchel *contra* Johnston. ---- The passing of a bill of suspension being a judicial act to which no person is cited, makes not *lis pendens* to give the suspender the benefit of the cedent's oath, unless there had been a citation upon the suspension, or at least the same had been intimated to the cedent before the conveyance was completed by intimation of the assignation to the suspender. Forbes, 23d July 1707, Burton *contra* Hamilton. ---- A lady having raised reduction of a bond granted by herself, but, after executing against the creditor, having suffered the same to fall by lapse of year and day; the Lords found that this did not make the cause litigious against an onerous assigney, whose right was dated after the summons were fallen, so as to give the lady the benefit of the cedent's oath. Fountainhall, Forbes, 21st January 1709, Houston *contra* Lady Kincaid.

FOUND, That in regard *pendente lite nihil est innovandum*, the defender could not put the pursuer in a worse condition, by assigning his right *pendente processu* to a person against whom a reply was not competent that would have been competent against the cedent. Newbyth, 14th July 1666, Sharp *contra* Brown. Falconer, 22d November

ber 1683, M'Brair *contra* Crichton.----Where the matter was litigious before assignation, the cedent's oath is good against the assignee, not as a witness, but as a party, and he may therefore be holden as confessed. Stair, 20th June 1673, Somervell *contra*

Marriage
pendente lite.

OATH of the wife not good against the husband, but a woman marrying during a dependence, when the matter was litigious, her oath in this case was found to militate against the husband. Haddington, 30th December 1608, Lady Manour *contra* . Stair, 29th January 1663, Edgar *contra* Murray.

Encroach-
ments *pendente*
lite.

MUTUAL declarators being raised by an heretor and a neighbouring burgh, about the property of a moor, and a conjunct probation allowed; and the heretor representing by bill, That the burgh, *medio tempore*, was exhausting the moor, by casting double the quantity of peats they were in use to cast, and craving, That the Lords would discharge any further casting, or removing what was already cast during the dependence; and the town pleading an *uti possidetis*; the Lords thought their possession could not be inverted nor stop'd *medio tempore*; but declared, That when the cause came to be advised, if they found that the town had no right to the moor, or a limited right, they would consider the waste and damage made, and would lay it upon some other quarter of the moor belonging to the town to make it up. Fountainhall, 9th June 1708, Frazer and M'Kenzie *contra* town of Inverness.

Executions,
&c. if they
can be mended
after being
produced in
process?

EXECUTIONS after being produced in process, are allowed to be amended at the bar, the pursuer bidding thereby. Stair, 25th January 1667, Earl of Argyle *contra* Campbell.---It being objected against an execution done at the mercat-cross, That it did not bear *the leaving or affixing of* a copy, process was notwithstanding sustained, the messenger adding the said clause to the execution, and abiding by it as true. Stair, 6th July 1671, M'Rae *contra* Ld. M'Donald.--An inhibition being executed at the defender's dwelling-house, the execution was sustained, tho' the dwelling-house was not design'd therein, the messenger condescending upon the name of the dwelling-house, and abiding by the execution that it was truly done there.---Stair, 22d December 1676, Inglis *contra* Haddoway.---The like with regard to an execution of a summons. Forbes, 26th February 1709, Junkison *contra* Lady Ardvorlick.---An execution being quarrelled on the act 6, parl. 1672, for not designing specially the defender, he being only design'd in the summons, and in the execution, *the within designed*; the Lords allowed the pursuer to amend his execution, and, that being done, sustained it. Fountainhall, 10th November, Home, December 1683, Maxwell and Home *contra* Thomson.---An execution before the sheriff-court, wanting the words *personally apprehended*, where the libel was referred to oath, was sustained by the Lords, the officer having given another execution bearing the said words, and offering to abide at the truth of it. Fountainhall, 4th January 1709, Stewart *contra* Maver.---An execution of arrestment being quarrelled, as bearing delivery to the party's wife and son, without adding that it was within his dwelling-house; the Lords would not sustain the same, unless it were added by the messenger, and abidden by, *that it was delivered to them*

them in the party's dwelling-house. Stair, 11th December 1679, Countess of Cassils *contra* Earl of Roxburgh.---- Witnesses having been adduced before the Lyon-court, for proving a point, it was found in an advocacy, that the examination of these witnesses was null and informal, and not probative, till they were led again before the Lords upon the getting up of the former depositions; and this because the said depositions were not sign'd by the Lyon as judge, till they were judicially produced before the Lords, and quarrelled upon that nullity. Fountainhall, 20th November 1703, Smart *contra* Hislop.---- A disposition subscribed by notars, containing a competent number of witnesses inserted, but subscribed only by three of them, being judicially produced, and the fourth witness having afterward sign'd, the Lords annulled the deed, and found the original defect not supplyable *ex intervallo*. Forbes, 19th January 1710, Straiton *contra* Robertson.--- An instrument of requisition produced in process, being objected to for not bearing production of the procuratory, the Lords would not allow the notar to give out another instrument, bearing that the procuratory was produced; for if this were allowed, too much would be left in the power of a notar. Stair, Dirleton, Gosford, 12th January 1677, Jeffray *contra* Ld. Wamphray.---- A posterior assignation was preferred to one granted and intimated before, whereof the instrument of intimation wanted subscribing witnesses, altho' the first assigney produced a new instrument of intimation of the same date with the former, duly sign'd by the same notar and the witnesses design'd in the first instrument; and this in respect that the formal instrument was not produced till after the first was registred, and an interlocutor of the Lords pronounced thereon. Forbes, 28th February 1713, Duncan *contra* Innes.

AN execution of an inhibition null, as not bearing delivery of a copy, and so registred, found not supplyable by production of a regular execution, which the messenger offered to abide by; for purchasers are bound only to notice what they see upon record; and if they pay their money upon the faith that such an execution is null, they ought to be safe. Stair, 28th July 1671, Keith *contra* Johnston.---- The like found with regard to an execution of an inhibition, not bearing six knocks, tho' the question was not with an onerous purchaser. Stair, 19th November 1680, Hay *contra* Lady Ballegerno.

Executions of legal diligence after registration.

A RELICT pursued by the defunct's creditors for her intromission with his effects, finding that she would be made liable *in valorem*, did confirm the subject as executor-creditor to her husband, and thereupon pleaded a preference; the Lords found she could have no preference upon a title thus made up *pendente processu*. Forbes, 23d July 1713, Black *contra* Lindsay.

Titles made up *pendente lite*.

COMPARE Quod ab initio vitiosum.

Litigious by arrestment.

ARRESTMENT being laid on in a purchaser's hand, and inhibition used against the feller; thereafter there is a tripartite contract entred into

Common debtor cannot discharge after arrestment.

into amongst the common debtor who sold the land, the purchaser in whose hands the arrestment was laid, and a third party; the purchaser therein assigns the minute to the third party, who obliges himself to pay the price to the seller, and the seller thereupon discharges, in so far as related to the first purchaser. The intent of all which was to evacuate the first bargain betwixt the common debtor and him in whose hands the arrestment was laid, so as to disappoint the arrestment, and at the same time make a new bargain of sale, which should not be subject to the inhibition. The Lords found, That by the arrestment the price of the land was affected; and that the common debtor's discharge could not disappoint the effect thereof. Stair, 23d November 1665, Campbell *contra* Beaton.

Bars not purchasing in publick mercat.

FOUND, That arrestment laid on goods could not hinder the lieges to buy in publick mercat. Hope, (*Arrestment*) 24th June 1620, Aitken *contra* Anderson.

Bars the competitor from assigning.

IN a competition betwixt an arrester and an assigney from the donatar to the common debtor's escheat, the arrestment being laid on before the donatar made the assignation; the Lords found, That whatever alledgeance of simulation could have excluded the donatar after the arrestment was laid on, the same was now good against his assigney. Durie, 10th December 1623, Douglas *contra* Belshes. Durie, 26th July 1628, Reull *contra* Ld. Ayton.

Arrestee can do no deed to disappoint the effect of the arrestment.

THE creditors of a feller of cows, having arrested the price in the purchaser's hands, and he in the forthcoming deponing, That he had dissolved the bargain for the rest, since he had no hopes to get the cows; the Lords rejected this quality, seeing he ought not to have destroyed the contract, nor dissolved the bargain to the arrester's prejudice, but they allowed him to make up the tenor of the contract, and deliver it to the arrester, or else pay the debt. Fountainhall, 24th December 1679, Home *contra* Taylor.

Mora.

AN arrestment having lien over two years without any diligence thereon, and the common debtor having thereafter assign'd the subject arrested, in a forthcoming at the arrester's instance, the Lords, in respect of the *mora*, preferred the assigney. 7th January 1729, Thomson *contra* Spence.

Litigious by Denunciation upon a Horning.

Debt contracted after denunciation.

No debt contracted by a rebel, after denunciation, can burden his escheat. Stair, 24th February 1669, Countess of Dundee *contra* Straiton.

Alienation after denunciation.

THE king's donatar pursuing for declarator of a rebel's liferent of lands holden by him of the king, will not be impeded by any base infeftment granted by the rebel, after his being year and day at the horn, albeit it be granted before obtaining declarator. Haddington, 18th January 1611, Ord *contra* Keith. --- A vassal being put to the horn, and remaining rebel unrelaxed year and day, the Lords found, That after denunciation he could not make any valid disposition, whereby the casualty of the subsequent liferent might be prejudged; and this

this altho' the infestment given by the rebel was for satisfying of a just debt. Durie, Spotiswood, (*Horning*) 23d January 1627, Lindsay *contra* Porteous. Hope, (*Horning*) 26th July 1627, Inglis *contra* Wood. Durie, Spotiswood, (*Horning*) 19th March 1628, Raith *contra* good-man of Buckie. Durie, 6th December 1638, Cochran *contra* Dawling.---- A right of teinds made by a rebel at the horn, altho' no declarator had as yet followed, was refused to be sustained to defend the party in a spuilzie, altho' the right was purchased by him from the rebel for a great sum, and that he had possessed for 10 years, specially seeing the action was for spuilzie of the teinds of years after declarator. Durie, 18th December 1629, Ld. Caprington *contra* Cuninghame.---- An assignation, tho' onerous, was found null, as being granted by one after he was denounced rebel, tho' before gift or declarator of his escheat. Durie, 6th December 1631, Ld. Conheath *contra* Ld. Earlston. Durie, 20th July 1630, Ld. Ley *contra* Porteous. Durie, 2d February 1632, Lindsay *contra* Nisbet. Forbes, 17th June 1712, Ker *contra* creditors of Harden.---- One after he was rebel, but before year and day having disposed his lands for an onerous cause, and the purchaser being infest, possessed 12 years unquarrelled, notwithstanding whereof the superior was found to have right to the profits of these lands during his vassal's life. Durie, 28th March 1632, Ld. Lochinvar *contra* Wauchop.---- A defender in a declarator of single-escheat having pled, That the goods belonged to him in virtue of a disposition granted by the rebel *stante rebellione*, for the price of corn and straw he had furnished to the rebel for maintaining his cattle, which was to the benefit of the donatary to the escheat; the Lords, nevertheless, found, That the property of the goods belonged to the king by the rebellion, and that the donatary was not obliged to debate upon what account or occasion the rebel was debtor to the defender, and is in no worse case than a creditor pouding or arresting, who would be preferred, notwithstanding such pretences. Dirleton, 12th June 1667, Lumisdien *contra* Summers.---- One getting a disposition to some goods from his debtor *obætatus*, in corroboration of his debt, before the granter was denounced, but the disposition bearing a power to revoke and alter, and possession being also retained, tho' the granter died within a week thereafter, and the goods, after his death, were roup'd and sold by the creditor for his debt, which became thereby extinct; yet the Lords preferred the donatary of the defunct's escheat to this assigney, but ordained the said donatary to dispoise all his right to the assigney for operating his relief. Fountainhall, 15th November 1698, Sinclair *contra* Bairnsfather.---- In an exhibition of writs, the defender alledging they were expressly impignorat to him for security of money lent, and proving the same *scripto*, this was nevertheless repelled, because, they being the writs of lands, the pursuer had bought the lands from him who impignorat the writs by contract, whereupon he had denounced the seller, and served inhibition against him before the bond or impignoration. Durie, 21st December 1626, Dundas *contra* Strang.

NOTWITHSTANDING of the act of parl. anent assignations *stante rebellione*, the rebel who disposed lands before the rebellion, may, during the same, assign any warrandice competent to him, it being only accessory to the disposition. Colvil, Lord Forbes *contra* Marquis

Bars not completing rights, where there is an antecedent obligation.

of Huntly.---A bond granted after denunciation sustained, being granted in satisfaction and implement of a contract anterior to the rebellion. Stair, 28th January 1676, Jackson *contra* Simpson. --- A man being creditor to a party before his being put to the horn, and after the rebellion getting from the rebel a blank bond, and filling up his own name in it; in a competition betwixt him and another creditor who was donatary to the escheat, the Lords preferred the donatary. Fountainhall, 12th February 1697, Burnet *contra* Auchterlony and Ogilvie.

If it bars
payment and
other deeds of
ordinary ad-
ministration?

A CREDITOR after citation against him in a process of adultery, which carries escheat of moveables, having compted and cleared with his debtor, and given him a discharge; the discharge was found good against the donatar of escheat, only the Lords ordained him to depone, that the accompt was fair and true, and the discharge onerous. Durie, 10th July 1630, Schaw *contra* Duke of Lenox.---Found, That a rebel might validly deliver his goods to lawful creditors in payment, altho' the delivery was made after the horning, provided it was done before the escheat was gifted. Durie, Auchinleck, (*Rebel*) 10th February, Spotiswood, (*Escheat*) 13th February 1635, Mosman *contra* Lockhart and Laing.---But the donatar was preferred where the creditor did not attain possession before the gift. Spotiswood, (*Escheat*) 30th July 1636, Johnston *contra* Johnston. --- An assignation granted after rebellion, tho' for a prior debt, and before declarator of escheat, is excluded by the gift of escheat; but if the assigney obtain payment he is secure. The reason is, because after denunciation, the matter becoming litigious, the rebel is tied up from doing voluntary deeds, of which nature this assignation was, but payment is a necessary deed, in so far as the rebel was antecedently bound thereto. Stair, 10th December 1673, Veitch *contra* Pallat. --- The like. Stair, 18th January 1678, Purves *contra* Deans. --- A blank bond delivered by the rebel to one of his creditors, after denunciation, but before declarator, in satisfaction of a debt due before rebellion, was sustained against the donatar of escheat. Stair, Gofford, 19th December 1676, Grant *contra* Lord Bamff. Stair, 17th January 1677, *inter eosdem*. --- An assignation was sustained, tho' after denunciation upon a horning, being in satisfaction of a just debt, whereupon diligence was done by denunciation prior to the other denunciation. Fountainhall, 21st November 1677, Nicolas and Burn *contra* Archbishop of Glasgow.

Tack granted
after denunciation.

A TACK set by a man at the horn for less duty than was formerly paid, was found null. Haddington, January 1601, *contra*. --- A tack given by the rebel after denunciation, found null by way of exception at the instance of the donatar, albeit given before his escheat was gifted. Haddington, 8th March 1611, Ewing *contra* Ld. of Ley. Haddington, July 1611, Lord Salton *contra* Ld. Balveny. Haddington, July 1611, *contra*. --- Found, That a tack set by the rebel for the old duty *stante rebellione*, could not be taken away by the gift of liferent escheat, because the tack was set before expiring of the year and day. Hope (*Horning*) 7th December 1614, Charteris *contra* M'Clellan. --- A tack set to a kindly tenant after the rebellion, but before the gift of liferent escheat or declarator was sustained. Hope, (*Horning*) 20th November 1621, Ld. Parton *contra* Ld. Drumraih. --- Found, That if one be denounced and remain year and

and day at the horn, he cannot from the time of his denunciation dis-
 pone any of his lands in prejudice of the superior ; yet that, before ex-
 piring of the year and day, he may set tacks for payment of the old duty.
 Spotiswood, (*Escheat*) Earl Tullibardin *contra* Dalziel.

FOUND, That a rebel may assign a debt even after the rebellion (pro-
 vided it be before general declarator) in prejudice of the king's donatar ;
 and that the act 1592, *cap.* 147, strikes only against assignations made
 in defraud of the creditor at whose instance the debtor was denounced
 rebel. Auchinleck, (*Rebel*) 14th January 1635, Lindsay *contra* Ld.
 Corshaw.----The Lords found, That the act of parl. 1592, was not in-
 tended against heretable rights, but that they may be disposed even by
 a man at the horn, because that, if the act were generally understood as
 the words seem to purport, then no man at the horn could dispoise his
 lands ; so that the horning should be as an inhibition, whereas the
 context of the act strikes only at assignations of things escheatable. Du-
 rie, 21st March 1623, Cuninghame *contra* Earl Glencairn. Durie,
 10th February 1624, Ld. Edmondston *contra* Earl Lothian. Durie,
 3d July 1624, Muir *contra* Ahanny. Durie, 8th March 1639, Ld.
 Pinkell *contra* Kennedy and Inglis.

Act 147,
 parl. 1592.

Litigious by denunciation upon apprising, and ci- tation upon adjudication.

AFTER denunciation of lands to be comprised, the Lords found, <sup>Alienation
 after denoun-
 ciation.</sup> That the debtor could do no voluntary deed by disposition, or selling
 the lands, tho' to a creditor, in prejudice of the denouncer, if comprising
 actually followed upon the denunciation. Auchinleck (*Comprising*)
 7th February 1629, *contra* .---- A compriser prefer-
 red to the mails and duties of the lands comprised, notwithstanding of a
 tack set after the comprising by the common debtor to another creditor
 for his security and payment ; altho' the tackfman alledged the com-
 prising was deduced for a very small sum, and the lands were sufficient
 to pay both their debts, seeing the only remedy competent to the tackf-
 man in that case was to redeem the comprising. Durie, 20th Febru-
 ary 1627, Garden *contra* .---- The Lords found, That an in-
 feftment of annualrent granted by the common debtor, could not be
 sustained in prejudice of another creditor's adjudication, the infeftment
 of annualrent being granted after citation was given to the common
 debtor upon the summons of adjudication. Home, January 1682,
 creditors of Menzies of Enoch *contra* . Falconer, 21st January 1682,
 Douglas *contra* creditors of Enoch. ---- Found, That a debtor could
 not make any right voluntary, or prefer one creditor to another after
 citation upon a summons of adjudication, no more than he could dis-
 pone lands after denunciation upon letters of apprising. Home,
 January 1684, Lord Cardross *contra* Van Arsen Somardyck. Falco-
 ner, 1st February 1684, Anderfon *contra* Anderson.

FOUND, That after denunciation upon a comprising, the debtor can-
 not set a tack of his lands, nor do any other voluntary deed which may
 be prejudicial to the denouncer, if he lawfully and timeously perfect his
 comprising thereafter ; and that altho' the debtor be neither bankrupt
 nor

Tack grant-
 ed after de-
 nunciation.

nor at the horn, nor under inhibition at the time. Durie, Spotiswood, (*Comprising*) 17th February 1629, Blackburn *contra* Gibson.

Right granted in consequence of an antecedent obligation.

In an action of pointing of the ground, the Lords found, That an infeftment, granted by one to his creditor after denunciation used by a third party, who thereupon comprised, was a good infeftment, in respect it depended upon a contract preceeding the denunciation, whereby the said debtor was obliged to infeft in an annualrent. Hope, (*Comprising*) 16th June 1612, Cuninghame *contra* Henderson.

Mora.

A DEBITOR having disposed the lands after leading the comprising, but before infeftment taken thereon, the Lords refused to reduce the alienation at the instance of the compriser, in respect of the long time (*viz.* six years) that had intervened betwixt the comprising and sale. Spotiswood, (*Comprising*) 21st July 1627, M'Culloch *contra* Hamilton. --- A posterior voluntary base infeftment, granted for onerous causes, and clothed with possession, found preferable in a possessory judgment to a prior comprising, in respect the compriser had been *in mora* by lying out four years without doing any diligence. Durie, 29th March 1636, Earl Galloway *contra* Gordon of Kingstair. --- A disposition and infeftment found to give the benefit of a possessory judgment, tho' granted after denunciation of an apprising, which made the matter litigious. Stair, 17th July 1668, Stewart *contra* Murrays. --- Denunciation of apprising makes the subject litigious, after which the debtor cannot make any voluntary alienation in prejudice of the apprising, provided the appriser proceed in diligence to obtain infeftment or charge the superior; but if he be *in mora*, the effect of the litigiousness ceases. Stair, 23d July 1674, Johnston *contra* Johnston. --- Denunciation of apprising renders the subject litigious, after which every voluntary alienation by the debtor, even for a price told down to prevent the appriser *in cursu diligentiae*, is ineffectual; but where the appriser was silent and negligent by the space of ten years without infeftment or charge, and without pursuing for mails and duties, he was not allowed to plead the litigiousity, since it could not be said that he was *in cursu diligentiae*. Stair, 8th February 1681, Neilson *contra* Ross. --- In a reduction of a voluntary alienation, granted after the subject was adjudged, the adjudger was found to be *in mora*, having lien over seventeen years before the voluntary alienation was made, and thereafter above thirty three before any challenge; and therefore was denied the benefit of the reduction. January 1731, Buckay *contra* Bell. --- A compriser being *in mora* for twelve or thirteen years, not obtaining infeftment, nor charging the superior, nor using diligence to recover possession by mails and duties, or otherwise, a voluntary disposition for a price paid, granted after the comprising, with infeftment upon it, was found preferable. Fountainhall, 25th February 1680, Earls of Southesk and Northesk *contra* Ld. Powrie, &c. --- An adjudication was deduced December 1726, with a charge against the superior February thereafter; in May 1730 the debtor granted an heretable bond, upon which infeftment followed in October thereafter. In a competition betwixt the adjudger and annualrenter about the mails and duties arising *anno* 1735, the infeftment of annualrent being the first real right, was challenged as granted *in cursu* of the adjudger's diligence. Answered, The adjudger was *in mora* by not taking infeftment. Replied, *imo*, An adjudger

adjudication with a charge is an effectual diligence, after which there can be no *mora*. See Lord Stair, *Tit. Dispositions* § 20. *in fine*, and § 23. *2do*, An adjudger is not bound to take infeftment during the legal, Stair, *Tit. Infeftments of Property*, §. 30. and therefore during the legal he cannot be *in mora*, tho' he neither take infeftment nor charge the superior to give him infeftment. The Lords preferred the adjudger. 8th December 1736, Wallace of Cairnhill *contra* Jean Barclay.

Litigious by inchoat inhibition.

A DISPOSITION granted by the common debtor, after inhibition was published at the mercat-cross, but before registration, was reduced *ex capite inhibitionis*; tho' it was alledged for the onerous purchaser, That the lieges cannot certainly know of inhibitions but from the records. Dirleton, Stair, 12th February 1675, Cruickshank *contra* Wat. --- One having executed an inhibition against his debtor personally upon the first of the month, against the lieges at the mercat-cross upon the fourth, and registred the same upon the sixth; the personal execution followed out *sine mora*, was found to render the subject litigious, so as to cut down a minute of sale subscribed by the debtor of his lands the second of the month. Marcus, (*Inhibition*) March 1686, Gartshore *contra* Sir James Cockburn. --- But signeting letters of inhibition the same day that the debtor subscribed a minute of sale, not executed till the day after, was found not sufficient to render the subject litigious. Marcus, (*Inhibition*) 3d July 1688, Bairdy *contra* Henderson.

Alienation
after inchoat
inhibition.

Litigious by using an order of redemption.

THE reverfer using an order of redemption against the wadsetter, and afterwards assigning the reversion and the order, it was found, That every personal exception competent against the reverfer himself, is equally competent against the assignee in this case, which would not have been, had he been first made assignee to the reversion, and afterwards used the order in his own name. Durie, 10th December 1631, Bennet *contra* Bennet.

Litigious by infeftment.

A PARTY who had wadset his lands, and taken a back-tack containing a yearly duty more than the legal interest, did grant an infeftment of annualrent over the same lands to another creditor; and lastly, discharged the said back-tack. In a competition betwixt the wadsetter and annualrenter, it was objected against the wadsetter, That his wadset was usurious in terms of the act 251, parl. 1597. Answered, The back-tack was discharged, the only branch of the transaction that was usurious; and as the common debtor neither did, nor could now make the objection, it is not competent to any other by the said act. Replied, Supposing the back-tack still subsisting, it would be competent to the annualrenter to object usury in his debtor's right; and this privilege could not be taken from him by his debtor's voluntary discharging the back-tack. Duplied, There is nothing in law to bar a common debtor to pass from any of his privileges, even after he has contracted debts real or personal, tho' these privileges, if subsisting, might be be-

ficial to creditors. The Lords found, That the back-tack being renounced, tho' after the infeftment upon the annualrent-right, the wadsetter had thereby right to the whole profits of the land, the objection of usury being thereby sopite. Durie, 8th March 1631, Ld. Clackmannan *contra* Ld. Allardice.

TO whom competent to make the objection of litigiousity. See Jus tertii.

LOCUS POENITENTIÆ.

Where writ
is requisite.

THE Lords found in a bargain of lands, one of the parties deceased before any writ was adhibited, altho' none of themselves refused, nay something was performed in contemplation of the agreement; yet that the bargain ceased, and that the other party had action against the representatives of the defunct for restoring what the said defunct had received. Durie, 5th December 1628, Oliphant *contra* Ld. Monorgan. --- Verbal submissions and verbal decreets-arbitral are binding, tho' writ be not adhibited. Stair, 7th February 1671, Home *contra* Scot. --- A man having promised to set a tack of customs to another so much cheaper by year than any other should offer, and being pursued therefor, after he had, *de facto*, set them to another; the Lords, in regard that this was but a naked communing, not bearing any special tack-duty, nor any writ adhibited thereto, found that there was *locus pœnitentiæ*. Nicolson (*Promise*) 26th December 1626, Power *contra* the customers. --- A paction to continue a tack for a course of years, was found only probable *scripto*, except for one year. Maitland, 12th November 1567, Charteris *contra* M'Duff. --- In case of a five years tack, the Lords found, That the tenant having possessed three of the years, he could not renounce for the other two at his pleasure, altho' the tack was but verbal. Spotiswood, (*Tack*) Auchinleck, (*Tack*) 24th January 1629 *contra*. --- A party having taken a tack for five years, and laboured the lands for two years thereof, but the tack not being in writing, altho' the master offered to refer to the tenant's oath both the five years set and the two years labouring; yet the Lords found, That he might repent and quit the room at any year thereafter before Whitsunday, the tack not being perfected by writ. Durie, 16th July 1636, Keith *contra* Johnston's tenants. --- Land being set verbally to a tenant, under a penalty, That, if he entred not thereto, he should pay a year's duty; and he not having entred, but given over the same *debito tempore*, the Lords found, That there was place for repentance to the tenant, and that he might quit the bargain *rebus integris*; and this, altho' the master had built barns, byres, &c. for the tenant's use in labouring, which they found was no prejudice to him, seeing they could serve for any other tenant. Durie, 15th July 1637, Skene *contra*. --- A verbal promise not to remove a tenant for a year, is relevant, and therefore probable by witnesses. Colvil, May 1582, Ld. Monteith *contra* tenants. Erskine, 13th January 1592, Binning *contra* Douglas. --- It being objected

jected against a removing, That the pursuer had promised verbally to the defender, not to remove him for two years after expiry of his tack; the Lords found the promise probable by witnesses for one year, but for the second year *scripto vel juramento* only. Nicolson, (*Removing*) 5th June 1611, Baillie *contra* Somervell.---- The like, where the alleged promise was not to remove the defender during his life, he paying the old duty. Nicolson, *ibid.* 25th June 1611, Low *contra* Lyell.---- The like, where the promise was not to remove the defender from a wheat loft for five years. Nicolson, *ibid.* 11th June 1621, Johnston *contra* Logan.---- Two persons having excambed their shares in two publick companies, and earnest being given, but no transfer subscribed, and he who received the earnest refiling, on pretence that there was *locus pœnitentiæ*, because the bargain must be completed by writ, which was not done, tho' it was contended, That in all trading places abroad there was no more required but the set, and these *sponsiones mercatorum* were binding from the date; the Lords thought the refiling ungenerous, but could not subvert the principle of law, whereby there is *locus pœnitentiæ* till papers be subscribed; yet they thought that he ought to be repon'd *cum omni causa*, and not only his earnest returned, but all his damages likewise paid through not keeping the bargain. Fountainhall, 28th June 1699, Lawson *contra* Auchinleck.

IN a writ sign'd but by one notar, it being argued, That the law requiring two notaries, till both subscribe, the writ is incomplete, and so *locus pœnitentiæ*. There was found no place to refile after subscription of the first notar, the verity and warrant of the subscription being proved by the granter's oath. Stair, 18th December 1668, Swinton *contra* Brown.---- One of the parties in a mutual contract, who alone had subscribed the same, being charged upon the contract, the contract was sustained, the charger appearing instantly in judgment, and subscribing the contract. Durie, 9th February 1627, M'Duff *contra* M'Culloch.---- A bond of alienation being subscribed, and delivered to a writer for the behoof of the purchaser, and to form charters thereupon, and thereafter borrowed up by the granter to compare with the said charters, upon promise to deliver the same back, which promise was often thereafter repeted; yet the Lords found, That the granter might still refile from the bargain, seeing it was not perfected by tradition, and the after-promise to perfect, was, for the same reason, not obligatory, seeing the defender had still place to repent, because the pursuer might refile, there being nothing extant that could compel him to pay the price. Durie, 16th December 1626, Byres *contra* Johnston.---- A contract being made betwixt a liferentrix and her son a pupil and his tutor on the one part, and a third party on the other part, the Lords found, That tho' she had subscribed, and was in possession of the lands, (so that, during her life, the pupil's consent was of no use to the other contracter) yet the contract was null even as to her, as not being subscribed by the tutor. Colvil, June 1583, Thaine *contra* Cant.---- Three parties being in society, and a contract being entred into by them on the one side, and another person on the other side, which contract was subscribed by that person for his part, and by two only of the partners for theirs; yet the Lords found that the contract behoved to subsist against the two who did subscribe, (tho' not against the third) altho' the third should never subscribe, seeing the

Locus pœnitentiæ until the writ be perfected.

partnery might divide. Durie, 14th February 1632, Ld. Lamington *contra* Fowlis.---Cleghorn brewer made a bargain for victual, in Cave's name and his own, with Sir Alexander Hope of Kerse, and these two sign'd the contract, leaving room for Cave's subscription who was absent. Cave refusing to accede, and Sir Alexander insisting against Cleghorn for performance, the Lords found, That the pursuer was not bound by the contract, which remained an unfinished deed, as wanting the subscription of one of the parties-contracters, and as thereby he had *locus pœnitentiæ*, the same must be also competent to the defender. 6th January 1727, Hope *contra* Cleghorn.---A contract betwixt a single person on the one side, and several parties on the other, tho' not subscribed by all of them, was found not obligatory on the single person, altho' it was alledged, That *nihil illi deerat*, seeing the subscribers were willing to perform all that was prestable on their side, in the same manner as if the whole contracters had subscribed. Spotiswood, (*Contract*) 25th March 1634, Lady Edenham *contra* Stirling.---The heretors concerned in a common property, having agreed to submit the division thereof, the decreet-arbitral following thereupon was found null, in respect one of the heretors, tho' submitting with the rest, had not sign'd the submission; and found also, That this defect being objected to by one of the subscribers, could not be supplied by his posterior ratification of the decreet-arbitral. 29th January 1735, Bogle *contra* the heretors of Sandyhills.---A contract of marriage, bearing to be with the consent of the bride's father and mother, and narrating, "That the bride brings with her, likeas her father and mother do give with her obligations amounting to the sum of, &c." was found effectual in an action for the jointure after the husband's decease, tho' the bride's father did not subscribe the contract, nor did it appear that he had paid the tocher. Forbes, 3d February 1710, Ld. Airth *contra* Hamilton of Grange.

What writing sufficient to bar pœnitentiæ?

IN a verbal transaction about lands, the purchaser wrote a letter to the seller, bearing, That he was afraid not to get the money agreed upon, adding, All I can now say is, *I am not to pass from what was spoken betwixt you and me*; found there was yet place to refile, because the other party could not be bound by barely receiving the letter, and both behoved to be bound, or neither. Stair, Gilmour, 28th January 1663, Montgomery *contra* Brown.---But a lady having disposed her estate to her nephew, with a power of redemption, in a pursuit against her, to renounce the faculty of redemption upon her letters, promising to do it, if he would return from Rochel to Scotland; the Lords found, That there was no *locus pœnitentiæ*. Home, Fountainhall, 8th February 1687, Alexander *contra* Lady Kinglassie.

Ubi res non est integra.

IN a verbal bargain about lands, there was not found *locus pœnitentiæ*, because *res non erat integra*, the seller having proceeded to purchase in the right of superiority in consequence of the bargain. Stair, 23d July 1674, Earl of Kinghorn *contra* Hay.---A purchaser of lands having given a greater price, relying upon the superior's verbal promise to enter him *gratis*, the superior was found not to have *locus pœnitentiæ*, *quia res non erat integra*. Dirleton, 12th November, Stair, 1st December 1674, Gordon *contra* Lord Pittligo. See Stair, 10th December 1675, Park *contra* university of Glasgow.---A possessor being pursued to remove

move from a house, of which he had got a verbal tack from the pursuer to last for nine years, *locus pœnitentiæ* was found competent to the pursuer, tho' the defender pled, That *res non erat integra*, in that, the house being designed for a meeting-house, he had altered the partitions, and rear'd up pews to a considerable expence: But consideration of the expences laid out on faith of the verbal agreement was reserved. 18th November 1729, M'Kenzie and Wylie *contra* Trotter. --- A man being pursued by a woman to solemnize marriage with her, having got her with child under promise of marriage; the defence was, That after granting thereof, she carried herself unchastly, and bore another child; which, as it would dissolve the marriage, were it solemnized, *multo magis* must it hinder the solemnization. Answered, The child is presumed to be the defender's, *nam pater est quem nuptiæ demonstrant*. This presumption was found not sufficient, unless it had been a formal marriage, and therefore the woman was ordained to instruct that the second child was the defender's. Stair, Gilmour, 31st January 1665, Baptie *contra* Barclay.

A PARTY having sold an heretable right upon lands, and the buyer having delivered to him part of the price, and of consent consign'd the rest in a third party's hand, to be given up upon his granting a disposition, and the seller refiling, no writ having intervened, but only *rei interventus*; the Lords found that this *rei interventus* took off the power of refiling, and that *res* was no more *integra* if he took the money in part of the price. Fountainhall, 23d December 1697, Lawrie *contra* Craik and her husband. --- A man having refiled from a bargain of sale of houses, &c. before writ was adhibited, yet having got the evidents of the lands, and keys of the houses, &c. and possessed for a year and a half, and entred into a transaction with the heretor of the neighbouring tenement for building a fide-wall thereto, the Lords here found, That *res non erat integra*, and therefore decerned him to implement the bargain. Fountainhall, 5th December 1699, Thomson *contra* Thomson. --- Two merchants who had equal shares in a publick company, entring into a bargain of set, who should have both shares, and the one giving the other a piece of money, that he might have the option either to take the other's share, or part with his own to him, at the rate and price the other should set upon them; and the other thereupon having set the principal sum as the price on both their shares, and he who gave the piece of money accepting of the other's share at that rate, the Lords found, That the *rei interventus* sufficiently completed this set, by delivery of the piece of money, and the other's taking it; and therefore found the person who received the money liable to perform his bargain, and repelled the defence of *locus pœnitentiæ*. Fountainhall, Forbes, 14th July 1708, Graham *contra* Corbet. --- One of two parties contractors having subscribed the contract, and the other not subscribing, but having nevertheless fulfilled his part; the Lords refused to sustain the exception proposed for the party subscriber, That it was an incomplete evident as being only signed by one party, altho' the objection was made after twenty years; and their Lordships found, That the other party might yet subscribe. Colvil, January 1587, Scot *contra* Scot. --- A grassum being paid in contemplation of a tack for a certain number of years, and the tenant deceasing before these years were expired, found, That

his heir had right to possess for the remainder of the years, altho' the tack was never extended in writing. Maitland, 13th July 1553, *contra*. ---- A tack of tithes being subscribed only by the one party, the Lords sustained the tack, tho' not subscribed by the party who was to uplift the tithes, and found, That his entring to possession by virtue thereof, and paying some years tack-duties, did supply the want of his subscription. Home, March 1684, Home *contra* Home. ---- In a pursuit for mails and duties at the instance of a wadsetter, The Lords sustained the wadset, and repelled the following dilatory, *viz.* That the contract of wadset, tho' a *synalagma*, was only signed by the heretor, and not also by the wadsetter. Fountainhall, ult. January 1700, Ld. Innes *contra* Duke of Gordon.

Oath. THERE was not found *locus pœnitentiæ* after an oath was interposed. Stair, 15th July 1681, Campbell *contra* Moir.

Pacta liberatoria.

Pacta liberatoria are effectual without writ, and so there is no *locus pœnitentiæ*. Stair, 12th December 1661, Hepburn *contra* Hamilton. Stair, 8th February 1666, Ker *contra* Hunter. Stair, 25th February 1679, Stiel *contra* Ld. Orbiston. ---- *Pacta liberatoria de non petendo, de non repugnando*, and suchlike, are valid without writ; and therefore in these there is no *locus pœnitentiæ*. Stair, Gofford, 8th January 1670, Scot *contra* Murray. ---- Found in a competition of adjudications, That a prior adjudger, who had verbally preferred the posterior, might thereafter refile, the preference not being for an onerous cause. Marcus, (*Locus pœnitentiæ*) February 1687, Sir William Maxwell *contra* Mr. George Norwall. ---- A verbal concert amongst creditors for suspending diligence against the common debtor, was found obligatory; and that writ is not necessary in such a case. February 1726, competition betwixt M'Dougal and Clapperton.

Where writ is not necessary.

A PARTY having taken a house in Edinburgh in March, to enter at the Whitsunday thereafter; but having given it over again *de recenti*, so as there were more than forty days to run at the term; the Lords sustained the overgiving, in respect of the custom within Edinburgh, where such overgivings are sustained as legal, whereby all the penalty is the loss of the earnest, tho' this be an evident hardship upon landlords. Fountainhall, 20th February 1703, Wat *contra* Stewart. ---- A bargain for victual being completed and earnest given; the Lords found, That the seller (tho' no writ was adhibited) could not refile, nor be liberated by returning the earnest. Auchinleck, (*Buying and selling*) 17th February 1629, Brown *contra* Lord and Lady Whittingham. ---- The vendition of a ship being moveable, requires not writ, and there is no *locus pœnitentiæ*, unless it were a part of the agreement, that there should be a written vendition. Stair, 16th June 1681, Cathcart *contra* Holland.

Where the bargain is agreed to be perfected in writing.

In a contract of emption, vendition, it was agreed, That the buyer, for satisfaction of the price, should give assignation to certain bonds; it was found, That there was *locus pœnitentiæ* until the assignation was granted. Stair, 24th June 1664, Moffat *contra* Black. ---- Tho' writ should not be necessary to perfect the agreement; yet if parties expressly agree

agree to perfect it in writing, there is *locus pœnitentiæ* till the writ be subscribed. Stair, 12th January 1676, Campbell *contra* Douglas.

A MAN after a contract of marriage having refiled, without giving a reason, and the woman having been at some expence *eo intuitu*; in a pursuit for damages at her instance, the Lords, tho' they found, That *matrimonia debent esse libera*, and that there is *locus pœnitentiæ*; yet under that pretence one ought not to be damnified; therefore they admitted her expences to her probation, and she having proved, that she was put to the expence of a certain sum *eo nomine*, the Lords at advising, upon account of that expence, and for her loss of the mercat, modified a fifth part more than she had proved, in regard, especially, that he would give no rational ground why he gave up the bargain. The author observes, That this decision was equitable, tho' it was new. Fountainhall, 2d January 1685, Graham and Erskine *contra* Burn. --- In a pursuit for the penalty of a contract of marriage against a woman, who, notwithstanding her signing the contract with the pursuer, went off with another party; the Lords sustained the defence, That there was *locus pœnitentiæ*, and as there could be no process upon the contract for implementing the marriage, neither can there be with regard to any accessory stipulation in the contract: For if there is *locus pœnitentiæ*, the contract cannot be binding more than if it had not been subscribed. Bruce, 21st January 1715, Young *contra* Irvine and Anderson her husband.

Locus pœnitentiæ after writ is interposed.

FACULTAS pœnitendi *if transmissible to a creditor. See Personal and transmissible.*

M A N S E.

THE Lords found, That a minister cannot get a manse designed to him within the precincts of a monastery or bishop's palace, if there be another parson's or vicar's manse within the parish. Haddington, 20th June 1605, Balfour *contra* Archbishop of St. Andrews. Haddington, 22d January 1612, L. Pittenweem *contra* Durie.---Found, That lands dyked, inclosed, and planted about with trees adjacent to a feuar's house, may not be designed for a manse. Haddington, 20th June 1605, Marshal *contra* Carnegie.---- Found, That altho' the most ewest kirk-lands, where there was no glebe before, might be designed; yet that the houses upon that kirk-land could not be claimed by the minister, if these houses never belonged to any incumbent before, because there was no foundation in any statute for such a demand; and therefore that the minister had nothing left but either to deal with the parish to build him a manse, or pursue them for the same, or build it himself, the expences whereof would be refunded to his executors by the next inrant, conform to the act of parl. Durie, 11th February 1631, minister of Inverkeithing *contra* Ker.

Designation of the manse.

In a suspension of a presbytery's decret for building a manse, the Lords found, as follows, *viz. 1mo*, That by act 21st, parl. 1663, the minister

Form of designing manse,

D

ster

ster and tradesmen may proceed, tho' the heretors be absent or withdraw being cited, the minister having no other compulstion to bring them, save an intimation from the pulpit the LORD's day preceeding; but that the tradesman their being parishioners will not supply that clause of the act, requiring two or three of the most discreet men in the parish to be also present to assist and judge of the tradesmens schemes and estimates, who must be over and above the tradesmen themselves, who would be very unfit to restrict and limit their own work. *2do*, They found, That the ministers, by our law, are impowered to proceed to liquidate the value and price of the manse, not exceeding L. 1000 Scots, and likewise to choose the most convenient place for its situation near the church, with a suitable glebe, and grass or foggage for his horse and cows, and also to cast and proportion the sum liquidated upon the heretors, and to name a factor or collector for uplifting and debursing it. *3tio*, They found, That the rule of the cast must be not the real rent (which would put ministers to a long probation, and occasion many great debates) but the valued rent extracted out of the cefs-books. *4to*, They found, That tho' some of the heretors were dead, and others had the privilege as members of parliament, yet this would not sist process as to others. Forbes, 29th, Fountainhall, 31st January 1712, Steel *contra* his parishioners.

Who liable
to build and
repair?

TITULARS or tacksmen of teinds not burdened with reparation of manses. Stair, 16th January 1663, relict of Swinton *contra* Ld. of Wedderburn. --- The heretors are bond to build the manse, and life-renters are free of any burden upon that account. Stair, Fountainhall, 14th November 1679, minister of Morham *contra* Ld. Binston. --- The Lords found a burgh liable for reparation of the minister's manse, altho' it was a burgh-royal, because it had a manse and glebe, and land-wart parish, and so fell not under the act 21st parl. 1663. Fountainhall, 25th March 1685, Williamson *contra* parishioners. --- In a pursuit at the instance of the first minister of Kirkaldy against the heretors of the parish of Abbotshall that had been disjoined from Kikaldy for a proportion of the expence of repairing his manse, upon this ground, That the pursuer's stipend is wholly paid out of the teinds of Abbotshall, of which the defenders are titulars, and upon them also must the burden of the manse ly: The defenders were found not liable for reparation of the manse, having the manse of their own parish to support, Marcus, (*Ministers*) March 1685, the minister of Kirkaldy *contra* his heretors. --- The repairing of the manse during the vacancy, is a real burden affecting all vacant stipends by the act 21st parl. 1663, and the manse must be repaired out of the same, the parishioners proving that it was a sufficient manse at the removal of the last incumbent. Fountainhall, 6th December 1695, Lord William Douglas *contra* heretors of the church of Manner. --- In a question upon the act 21st parl. 1663, it was found, That vacant stipends might be applied by the heretors to the repairing of the manse, but not to rebuilding of the same, where it is totally ruinous. 16th December 1729, Moncrief *contra* Couper. --- The thatch roof of a manse, having, during a vacancy, suffered considerably by winds; the heretors agreed to give it a slate roof. The heretors craving retention of a year's vacant stipend to defray the expence of this reparation upon the act 1663, it was found, That they could not crave retention, in so far as the manse was meliorated,

meliorated, but only for needful repairs of deteriorations happening during the vacancy ; and because the limits betwixt these two was difficult to be made out by a proof, the Lords at a slump decerned for a third part of the year's vacant stipend. 27th February 1734, king's college of Aberdeen *contra* heretors of the parish of Newmachar.

As to bygones since the minister's admission, and till his manse be built, found, that he had a good claim, for as much as he had paid of house-rent, against the heretors. Forbes, 29th, Fountainhall, 31st January 1712, Steel *contra* parishoners. --- The Lords found, That a minister's proving his being in use to receive from the parish a sum of money for house-rent in lieu of his manse for more than thirteen years, did subject the parish in payment of bygones, and in time coming. Bruce, 22d January 1715, Ferguson *contra* town of Aberbrothock.

Ministers
claim for
house-rent.

IF the claim for reparation be good against singular successors. See Personal and real.

MARRIAGE (avail of.)

IN an action for the double avail, the Lords found no process, because the pursuer appeared not at the day, nor presented the gentlewoman ; notwithstanding the defender, the time of assigning of the diet, did not answer that he would come. Hope, (*Marriage*) 26th July 1616, Earl Angus *contra* Nisbet.

Form of re-
quisition.

THE Lords found a requisition not valid to infer the double avail, because the instrument bore not, That the donatar requiring had the gift in his hand, or shewed or exhibited the same, without which it could not appear that he had power to require ; altho' it was offered to be proved by the witnesses insert, That the gift was really exhibited and shown. Durie, 3d, Haddington, 4th July 1622, French and Ld. Thornedykes *contra* Cranston. --- In an action for the single and double avail of a marriage, the Lords found, That it was not necessary for the pursuer's procurator, who was to make the requisition, to shew his procuratory at the time of making the said requisition, unless the defender had required to see it. Spotiswood, (*Marriage*) Durie, 8th March 1627, Earl Rothes *contra* Balfour.

A REQUISITION was found invalid, because the party was required to come and confer about the marriage to the donatar's own lodging in Edinburgh, and not to some church, tolbooth, &c. or some common unsuspected place. Durie, 3d, Haddington, 4th July 1622, French and Ld. Thornedykes *contra* Cranston.

A REQUISITION was sustained, which bore " That the defender was " desired to come and treat with the party offered ; " altho' it carried no special day on which he was desired to come, seeing the day was special in the instrument, which day the Lords found the superior might appoint to the vassal, and needed not require the vassal to appoint it. Durie, 8th March 1627, Earl Rothes *contra* Balfour.

FOUND it not necessary, That the party offered should have declared her consent of the day prefixed for the marriage, nor that the instru-

ment needed to bear the same, since it bore, That she was then present in the church to have completed the marriage. Durie, 8th March 1627, Earl Rothes *contra* Balfour.

Double avail at what time due?

DOUBLE avail not payable till the ward-vassal be married. Hope, (*Marriage*) 21st January 1618. ---- The Lords found, That no execution can pass for the double avail, so long as the heir-female is unmarried, she finding caution to pay if she marry. Haddington, 27th January 1610, Ld. Kilbirnie *contra* Fairlies. ---- Found, That altho' the vassal was not yet married, the double ought to be decerned for, only they superseded execution for it, until it should fall by the vassal's marriage; because, so long as he remained unmarried, there was no contempt against the superior imputable to him. Durie, 8th March 1627, Earl Rothes *contra* Balfour. ---- Pursuit for the double avail. Stair, 22d February 1678, Drummond *contra* Stewart.

Single avail at what time due?

THE Lords found, That the single avail cannot be demanded, till the heir be entred, if he be minor, because he may decease before the ish of the ward. Balfour, (*Marriage*) 16th March 1540, Hamilton *contra*. ---- Found, That women minors are not liable for the avails of their marriages till they be 14 years old. Haddington, 27th January 1610, Kilbirnie *contra* heirs of Fairly. ---- The vassal dying, the superior has not only right to his apparent heir's marriage, if he be marriageable, and die unmarried, but also the marriage of his apparent heir, being marriageable, & *sic deinceps*, how many soever they be, tho' they nor none of them be entred to the lands, and tho' they die before majority. Haddington, 4th July 1622, Frenchlands *contra* Frenches.

If due, where the superior consents to the marriage?

SINGLE avail found due *ex contractu feudali*, and not as a penalty for failing to ask the superior's consent. Gosford, Stair, Dirleton, 3d January 1677, Earl of Argyle *contra* Ld. of M'Naughton. But this was thereafter altered, and it was found, That the superior, having consented to the marriage, could not claim this casualty. Dirleton, 23d January 1677, *inter eosdem*.

Consent how inferred?

THE superior's consent to the vassal's marriage by being a witness in the contract, excludes him not from the single avail of marriage. Stair, 25th February 1662, Arbuthnot *contra* Keiths. ---- A ward vassal having acquainted his superior, that he was to marry with such a young lady, whom he named; and the superior having returned an answer by a letter, That he could not but approve of his matching in that family, and if they did marry, he wished them well; the Lords found that this letter imported his consent to the marriage. Dirleton, 23d January 1677, Earl of Argyle *contra* Ld. of M'Naughton.

Refusal, if purgeable?

AN heir-female having a match offered to her without disparage, and refusing, was yet allowed to accept at the bar, a long while thereafter, when pursued for the avail, and so assailed. Maitland, Ordee *contra* heirs-female of Kinnocha. ---- Found, That he who refuses an offer of marriage, cannot be heard thereafter to accept the same. Colvil, 14th March 1579, Ld. Tullibardin *contra* Drummond. Maitland, 1st July 1568, Chrichton *contra*. Hope, (*Marriage*) 26th

26th July 1616, Drummond *contra* Ld. Manner.---- In a process for the fingle, and also for the double avail of a man's marriage, because of a lawful offer of a party without disparage, which was refused; the Lords, upon the man's offer at the bar yet to solemnize, ordained both parties to meet at such a church, on such a day, and there complete the marriage, with certification, if he failed, they would proceed to do justice as effects. Nicolson (*Marriage*) ult. July 1611, Home *contra* Brown.---- Found, That an heir may purge his refusal of the offer made to him, by accepting of the match when he is pursued for the fingle avail. Observed by Hope, who adds, That the contrary was also found.

AN offer of a woman in marriage being made by a donatar, which woman (tho' otherwise equal) was lame and blind of an eye; the Lords found that to be a relevant exception. Colvil, January 1589, *contra* Wood.---- Found, That it was no disparagement, tho' the person offered had no means at all; and that, in general, disparagement consisted not in means, but in blood or bodily defects, or great inequality of years. Durie, 3d, Haddington, 4th July 1622, French and Ld. Thornedykes *contra* Cranston. Maitland, 1st July 1568, Crichton *contra* . Haddington, 27th January 1610, Ld. Kilbirnie *contra* heirs of Fairly.

THE donatar of marriage making offer of an agreeable party, his offer is not obeyed, unless the vassal consent to give a conjunct-fee equivalent to the third of his living, and secure the same by contract of marriage. Haddington, 25th June 1611, Stirling *contra* Ld. Swinfield.

THE more antient superior is preferred in the avail of the vassal's marriage. Stair, Gosford, 26th June 1672, Earl Queensberry *contra* Duke of Buccleugh.---- A vassal holding ward lands of a subject, wherein the marriage was taxed, and holding other lands of the crown, the king was found to have right to the avail of marriage, as the greatest superior, and the subject superior was excluded, tho' the marriage was taxed; for tax'd marriage is only an agreement to pay a certain sum every time the casualty of marriage falls due, instead of the uncertain avail, which is in proportion to the vassal's estate. Stair. 19th July 1672, Earl of Argyle *contra* Ld. of M'Leod.---- A subject superior of ward lands in Scotland, was found not prejudged of the benefit of the marriage, tho' the same vassal held ward lands of the king in England or Ireland; and in the modification of the avail of the marriage, no consideration was had, unless of the lands within this kingdom. Gosford, 28th June 1672, Earl of Eglinton *contra* Ld. of Greenock.---- A vassal holding tax ward of the king, and simple ward of the prince, pleaded that he was only due his taxed marriage, the king excluding all other superiors. It was answered, That while there is no prince existing, the principality of Scotland belongs to the king *jure proprio*, and tho' he may exclude other superiors, he excludes not himself. It was found, That the king had right to the simple marriage holden of him as prince, while there is no prince existing. Stair, 9th January 1680, Purvis *contra* Ld. of Lufs.

Modification
of the casualty.

SINGLE avail estimated to three years rent, double avail to fix years rent. Haddington, 29th June 1622, *contra* .----
The Lords found, That the avail is to be considered according to the rental of the minor's free living, deducing the relict's terce and conjunct-fee, but that the rentals of all other lands, as well as those that hold ward, are to be computed, and that according to the profit they may yield, and not as they are presently set. Haddington, 1593, Douglas *contra* Ld. Gelston. ---- The present rent found to be the rule. Haddington, February 1604, Lord Privy Seal *contra* Maitland. ---- In a declarator of single avail of marriage, the modification is to be made with regard to the hail estate, real and personal, whether it hold of that superior or of others; and on the other hand, the whole debts personal and real, whether confirmed by that superior or not, are to be deduced, and the modification is to be of the free estate. Durie, 19th June 1630, Somervell *contra* Gordon. ---- Avail of marriage modified to a less sum than the rent of the lands, because many heirs marriages were granted together of that land. Haddington, 25th July 1622, Frenchlands *contra* Frenches. ---- Modification of the avail of marriage. Stair, 14th June 1673, Gibson *contra* Ramsay. ---- A process for the single avail of a marriage being raised, the Lords modified 9000 merks, the rents of the land being 3000; and it was thought that the avail of the marriage should be, in all cases of that nature, three years rent. Dirleton, 12th December 1674, Mowbray *contra* Arbuthnot. ---- One holding his estate of the crown, partly tax ward and partly simple ward, was found liable for the full avail of the marriage, allowing in the accompt L. 1000 for the tax marriage of the tax ward. Stair, 18th February 1675, King's advocate *contra* Ld. of Innernitie. ---- The heir is only liable for the avail of his marriage, effecting to the estate he got from his predecessor, without considering the value of his tocher. Stair, 5th January 1681, Ld. Dun *contra* Viscount of Arbuthnot. ---- In a declarator of the casualty of marriage, the Lords modified two full years free rent of the lands, but refused to have any consideration of the tocher received by the vassal as a part of the estate, in valuing the apparent heir's marriage, because it was liferented by the relict. Fountainhall, 7th November 1701, Baird *contra* Morison.

Fraudulent
marriage, in
order to disap-
point the casu-
alty.

IN a pursuit for the single avail of marriage, it was found relevant, that the marriage was done when the father was *moribundus* without proclamation, to presume that it was done fraudfully to exclude the king from his casualty, which must make the defender equally liable, as if the marriage had truly been celebrated after his predecessor's death. Balfour, (*Marriage*) 7th March 1588, the King *contra* Cairns. Haddington, 20th February 1606, King's advocate *contra* Ld. Lundie. Stair, 20th February 1667, Lord Treasurer *contra* Lord Colvil.

Personal ac-
tion for pay-
ment.

THE ground may not only be pointed for the avail of marriage, but the vassal was also found personally liable. Stair, 25th February 1662, Arbuthnots *contra* Keiths. ---- An apparent heir, tho' married, was found not personally liable for the avail of his marriage, not having entered into possession of his predecessor's estate. Stair, 5th January 1681, Ld. Dun *contra* Viscount of Arbuthnot.

MEDITATIO FUGÆ.

THE Lords were unanimous, That upon application to any inferior magistrate, a debtor *sub meditatione fugæ*, may be summarily incarcerated. Warrant for summar incarceration, who may grant the same? June 1727, Barrowfield *contra* Weatherspoon. --- Tho' it had been found that a baron bailie has not the power of summar incarceration. Stair, 18th January 1678, Neilson *contra* clerk of his brewery.

A BILL being given in by persons of quality, representing, That a writer to the signet had divers of their papers, and some of their money in his hands, and was absconding, and *in meditatione fugæ*; the Lords granted a summary warrant to apprehend him, not to be put in prison, but brought before the Ordinary on the bills, who was to examine him, and, if he found ground, was either to put him under caution for his appearance, or commit him to prison, he being a member of the college of Justice. If such warrants are granted by the court of session? Fountainhall, 21st February 1700, Earls of Strathmore and Panmure *contra* Innes.

A PARTY craving by bill a warrant to stop his own salt, which another was transporting beyond seas, the Lords found it not in their power to grant such summary execution against one who was not a bankrupt, but referred the petitioner to the admiral, who would summarily arrest the ship. Goods ready to be transported out of the kingdom. Fountainhall, 11th November 1680, Cornwall *contra* Grierson.

A DEFENCE being proponed by a cautioner, That the debt was paid by the principal, and the instructions found among his papers, and given back to the creditor's heir for a piece of money, and one man being concerned in this mystery, who was cited by a first diligence not yet expired, and a summary warrant being craved to apprehend him, because he was not only dealt with to abscond, but to retire out of the kingdom, and so their mean of probation might be forever lost; and if the bill were given out to see and answer, that intimation would make him instantly fly; the Lords, in respect of the singularity of this case, granted a summary warrant to apprehend him. Witness sub meditatione. Fountainhall, 3d January 1700, Watson *contra* Earl Linlithgow.

A MERCHANT having unexpectedly broke and fled, his creditors gave in a supplication to the Lords, bearing, That he was a fraudulent bankrupt, and that, being *sub meditatione fugæ*, he retained the price of the goods that he had sold in his hand, therefore craving warrant to secure his goods, and apprehend his person wherever the same could be found, until the matter were heard, which was granted. Summary warrant to apprehend a bankrupt who is fled. Stair, 30th November 1665, creditors of James Mason supplicants.

MEMBER OF PARLIAMENT.

Privileges.

A MEMBER of the house of Lords having been pursued in a process, and now that he was actually serving at London in that quality, a commission being directed thither, at the desire of his own advocate, for taking his oath upon some points of the libel, which being neglected, and the term thereupon circumduced; upon his petition, alledging his exemption from answering in any cause while a member of parliament, the Lords refused to repon him now after commission sought, but stopped extracting the decret of circumduction for four months, that in the mean time he might either depone at home, or upon a commission if he pleased; and this because the loosing of the circumduction might have lost the pursuer his only mean of probation, if the defender had died in the *interim*; by which temperament the Lords shun'd the deciding, whether such members had the privilege of not being obliged to answer, as being *absentes reipublicæ causa*. Fountainhall, Forbes, 17th February 1708, Ld. Grant *contra* Earl Sutherland.

A PROCESS against one who was actually serving in parliament, being given out to his advocate to see, but given back by him, without writing a return on it, so that it could not be inrolled; and he being required under form of instrument, and refusing, in regard of his constituent's privilege, the Lords, upon the pursuer's petition, found this defence not receivable *hoc loco*, and that the privilege could not extend to this case; and therefore ordained the cause to be enrolled of the date of the instrument. Fountainhall, 6th January 1709, Lady Greenock *contra* Sir John Schaw her son. --- But when the cause came in by course of the roll, after the parliament was up, the Lords found, That the process must be given out to be seen, and enrolled again in common form, because the 12 and 13 William III. *cap.* 3, doth not distinguish betwixt preparatory interlocutors, and those *in causa*. Forbes, 22d June 1709, *inter eosdem*.

THE Lords sisted process against a member of parliament, altho' he was not yet attending the house; in respect the parliament was sitting, and he claimed his privilege, and represented that he was going to attend it. Forbes, 15th November 1709, Livingston *contra* Ld. Prestongrange.

THE Lords allowed a member of parliament to claim his privilege to stop further process against him, altho' he had sisted himself *in initio litis*, and proponed peremptory defences, without founding on the privilege. Forbes, 17th February 1710, Bruce *contra* Dalrymple and Inglis.

A PARTY who had obtained a decret of the Lords of session to be reversed in the house of peers, with a remit to the Lords to tax his expences; and the other party founding on his privilege as a member of parliament, and this being allowed by the Lords, tho' the parliament was not then sit down; the plaintiff applied to the house of peers by a summary complaint, who ordered the Lords of session forthwith to tax his expences, and direct the payment thereof; and he now craving by bill, that their Lordships might do so, the Lords found, That by this last ordinance the peers had laid aside the defender's privilege of parli-

parliament as not competent in this case ; and therefore appointed him summarily to answer. Fountainhall, 25th, Forbes, 26th June 1712, Kennedy supplicant *contra* Cumming.

THE Lords allowed a creditor to raise, use, execute, and register inhibition without arrestment ; and to raise, use, and execute adjudication, and call the same against a cautioner, tho' a peer of parliament, reserving to the cautioner to propone against pronouncing act or decret thereupon ; and their Lordships also allowed the creditor to raise horning without poinding or arrestment, and to charge thereupon, *ad hunc effectum*, only to entitle him to the benefit of the diligence mentioned in the act 5th, parl. 1695, touching principal and cautioners. Forbes, MS. 1. 28th November 1713, Colonel Middleton and his Lady supplicants.

A MEMBER of parliament compearing by his lawyers in a ranking of creditors, who produced his interest, which got a place in the ranking ; was found excluded, by the defence of *res judicata*, from quarrelling by reduction the decret of ranking. Forbes, MS. 1, 20th January 1714, Lockhart *contra* creditors of Carlswell.

THE Lords found, That bonds wherein members of parliament are coobligants, may be registred in common form. Forbes, MS. 2, 1st July 1714, *contra* . . .

FOUND, That heretors and liferenters holding of the king's vassals, ought not to contribute with these their immediate superiors for the fees of commissioners to the parliament, seeing they have no vote in the election, and should be as free as the vassals of noblemen and bishops, notwithstanding of the general clause in the late act of parliament. Harcus, (*Summons*) July 1687, Touch *contra* heretors of Stirlingshire.

Fees of commissioners to parliament who liable?

MESSENGER.

TWO messengers found liable in payment of a debt, because having undertaken to incarcerate the debtor, they did, in place of that, put him in a private man's house, from whence they suffered him to escape, and these points found probable *pro ut de jure*. Durie, 13th February, 1628, Kello *contra* Mackison.

PAYMENT made to a messenger charging upon a horning, will not liberate the debtor without the creditor's express allowance ; but made to the messenger offering back the goods poinded or apprised, will liberate the debtor. Haddington, 21st June 1610, Ld. Rosyth *contra* M'Gill.

FOUND, That all messengers ought to be paid of their fees and expences for executing letters of horning or caption by the creditor employer, and not by any exactions from the debtor ; and found, That any messenger's claiming, exacting, or taking from any person or persons, under diligence by horning or caption, any sum or sums of money, or security for the same, under colour of fees or expence for executing or delaying of execution of any such diligence, or expence of going or coming to or from any place or places towards or in order to the execution

cution of such diligence, is unwarrantable, illegal and oppressive, and opens a door to high and grievous exactions from ignorant, distressed and indigent persons. 4th November 1738, *Monro contra Rofs.*

M I L L.

A mill does not pass as part and pertinent,

THE Lords found, That a mill comes not under the appellation of pertinents, because it requires a special *saſine*. Balfour, (*Part and Pertinent*) 7th February 1566, Lord Fleeming *contra* Lord Rofs. --- A mill cannot pass as a pertinent, but must have a special *saſine*; yet where it is built after the purchaser's infeftment, it accretes to him, *nam solo cedit*; and therefore a liferentrix infeft in lands, upon which a mill was thereafter built by the proprietor, was preferred to a posterior appriſer infeft expreſſy in the mill. Stair, 27th July 1670, Lady Halyburton *contra* creditors of Halyburton.---The like. Gilmour, January, Stair, 16th February 1666, Campbell *contra* Stirling. In which caſe the Lords declared, That if the huſband, who built the mill, did thirl any other lands thereto, beſides the liferent lands, ſhe was to have no benefit thereby.

Unless in a diſpoſition of a barony.

THO' mills be diſtinct tenements, and not carried as part and pertinent; yet in a barony, which is *nomen univerſitatis*, mills are carried tho' not expreſſt. Stair, 5th February 1667, Counteſs of Home *contra* tenants of AuldCambus.

Proprietor of thirled lands, cannot build a mill within the thirl,

A MAN's lands being thirled to another's mill, the Lords found, That the *dominus prædii ſervientis* ought not to build a mill upon the thirled lands, tho' he was infeſt *cum molendinis & molituris*, and offered to bind himſelf, that no thirled perſons ſhould grind at his new mill, but only ſuch as came voluntarily; for their Lordſhips judged, That *ineſt de jure*, tho' he be not expreſſy reſtricted or prohibited in his charter; and therefore ordained the mill to be demolished. Fountainhall, 28th February 1684, M'Dowal *contra* M'Culloch. --- The like. Fountainhall, ult. 1695, Crawford of Corſburn *contra* Sir John Schaw of Greenock

Nor ſet up a hand-mill.

A CHARTER granted to a royal burgh, containing this claufe, *Una cum molendinis & cæteris ſuis pertinentiis*, confirmed by divers other latter charters, beſides ſundry acts of their town-court for 150 years paſt, was found to conſtitute a thirlage upon the inhabitants, and of conſequence to reſtrain the brewers from uſing hand-mills for grinding malt, tho' the brewers founded on the common preſumption of liberty, and on their *reddendo*, which was only watching and warding; but it was found incumbent on the town to prove poſſeſſion, ſo as to preſerve their thirlage from the negative preſcription. Forbes, 19th, Fountainhall, 20th December 1710, town of Edinburgh *contra* brewers.

MINOR.

M I N O R.

AN infant was decerned in a process of spuilzie, viz. *ad civilem effectum, ne locupletetur cum alterius jactura*. Sinclair, 23d January 1541, Somervell *contra* Hamilton. --- A boy, tho' *pubertati proximus*, was found not capable of committing spuilzie in order to punishment. Maitland, 27th November 1565, Bryson *contra* Shearer. Pupil not liable to penalties,

THE Lords ordained a pupil of twelve years old, who was incarcerated to be set at liberty. Spotiswood, (*Minor*) 8th March 1633, Lord Erskine *contra* Ld. Edmonston. --- A pupil cannot be imprisoned for his father's debt. Colvil, 16th December 1577, Johnston *contra* . --- A minor at the school being put to the horn, yet his person cannot be apprehended with caption. Haddington, March 1612, *contra* . Nor to imprisonment,

AN infant of four years old being charged to enter heir, the Lords decerned against him, but superseded execution till his pupillarity were past, in respect he had no tutor. Stair. Dirleton, 31st January 1677, *contra* Murray. But decreet may pass against him.

THE Lords refused to sustain an incident against a minor, being only betwixt ten and eleven years old, as a haver and intrometter with writs, as not being at that age capable of intromission; altho' it was libelled, that the writs were in his father's hands when he died, and thereafter in his hands, he having intermeddled with them, and still retained possession, and was heir to his father. Durie, Spotiswood, (*Minor*) Hope, (*Exhibition*) 9th January 1628, Aitken *contra* Hewart. Cannot be decerned as a haver of writs.

A MINOR defender in an improbation, having taken out an incident for recovery of the writs libelled, and the pursuer referring the having of these writs to his oath; it was found, That all minors past fourteen must give their oaths in such cases, or be held as confest. Durie, 19th June 1628, Earl Mar *contra* his vassals. --- The like. Haddington, 16th January 1623, Maitland *contra* Cashogle. --- A minor was restored against alienation of lands, altho' he had given his oath never to come in the contrary. Maitland. 12th February 1567, Ld. Barnbugil *contra* Hamilton. --- Afterwards a minor's oath commonly sustained to exclude reduction upon minority and lesion. Stair, 10th February 1672, Wauch *contra* Baillie. Stair, 13th December 1677, Master of Mordington *contra* Oliphant. Till such oaths were utterly discharged by act 19th parl. 1681. Minor's oath;

IN a ranking of creditors upon an estate, neither a pupil nor his factors were found obliged to depone upon the verity of a debt for which the pupil was creditor by adjudication. Forbes, 17th July 1707, tutors of Gordonstoun supplicants. Not bound to depone upon the verity of his debt.

FOUND, That a boy *pubertati proximus*, may both execute and be witness to an execution of the king's letters. Colvil, November 1582, Home *contra* Home. If a minor can be a messenger?

If a tutor? THE nomination of a minor to be a tutor is not null, but he may commence his administration when he becomes of age. Maitland, 9th May 1558, Dishington *contra* Hamilton. ---- The king may dispense with the less age of a tutor in law, and may charge the inquest to serve him, notwithstanding the act 51st, parl. 1474. Balfour, (*Tutor*) 9th June 1548, Henryson *contra* . ---- Dispensation with less age makes not a man habile to be a tutor, but that the nearest of kin of perfect age must be served, and the minor arriving at that age, then to obtain his own place. Haddington, 3d January 1592, Elliot *contra* Elliot. February 1593, Ker *contra* Ld. Lufs.

If an arbiter? A MINOR may be an arbiter. Colvil, June 1582, Gordon *contra* Earl Errol.

If a commissioner of supply? A COMMISSIONER of supply by the nature of his office is a judge, and also liable as cautioner for the collector; and therefore it being objected against a commissioner of supply in a question, Which of two was legally chosen collector, that he was minor, the objection was sustained. 25th July 1735, Hay of Hopes *contra* Hepburn of Monkrig.

What a minor can do without consent of curators? MINOR may warn in order to a removing without consent of curators, because to his profit. Maitland, 12th February 1566, heirs of Ardros *contra* Dishington.

THE Lords found, That a tack accepted by a minor without his curators consent, was as null if it prejudged him as if he had alienated without their consent. Haddington, 21st March 1622, Seton *contra* Ld. Caskieben. ---- A minor having signed his sister's contract, and therein promised a sum in tocher to her, he having curators, without their consent; it was reduced by the Lords, tho' the action thereupon was moved forty or forty five years thereafter; but they reponed the sister also, who had in the contract discharged her bairns part of gear. Durie, 19th December 1632, Maxwel *contra* Earl Nithsdale.

AN exception being made against a bond, That it was null, as being granted by a minor without his curators consent, the bond was allowed to be supported by a condescence and proof, that the money was applied *in rem versum* of the minor. Haddington, 24th July 1605, M^c Adam *contra* Ld. Lag. Stair, 24th February 1672, Corfar *contra* Deans. Durie, 11th December 1629, Gordon *contra* Earl of Galloway. Fountainhall, 9th January 1678, Hamilton *contra* Ld. Lamington.

A MERCHANT may lawfully supply a minor with clothes and other necessaries, tho' without orders from his curators. Durie, Auchinleck, (*Minor*) 5th February 1631, Inglis *contra* Sharp. ---- The like. Durie, 22d March 1634, Rynd *contra* Earl Dumfermline. ---- A bond granted by a minor, without consent of her father as administrator in law, will be sustained, if it was for necessaries furnished to her. Durie, 23d March 1639, Stewart *contra* Stewart. ---- The Lords refused to reduce a bond granted by a minor without his curators consent, because it bore to be given by him to his governor for his fees and service; and the party offering to prove, that he was his governor and attended him, as the bond bore. Durie, 22d June 1627, Drummond *contra* baron of Brughton.

A GENTLE-

A GENTLEMAN of a considerable estate was not reponed against the purchaser of a horse, tho' made by him when minor, without consent of his curators, the horse not having been challenged or returned for a year after the sale. Durie, 9th January 1629, Brown *contra* Nicolson.

A BILL granted by a minor safe from the exception of minority and lesion, because he was a trading merchant at the time, was challenged as null, being without consent of the minor's father administrator in law. It was answered, That, if the minor's being a trading merchant, is sufficient to presume it a reasonable act, so as to defeat the exception of lesion, it must of course also defeat the nullity arising from want of the administrator's consent: For deeds done by minors, without consent of curators, are effectual, if rational and prudent, as well as where they are *in rem versum* of the minor. The Lords repelled the defence. 5th July 1732, Craig *contra* Grant.

THE Lords sustained a minor's breaking his father's tailzie and paying his debts, as rational acts, notwithstanding the minority, and tho' he did not adhibit thereto the consent of his curators. Fountainhall, 22d June 1687, Nicolson *contra* Ladies Greenock, Mochrum and Bancrief.

A MINOR having curators, may test without their consent, and may nominate his own curators to be his executors. Stair, 30th November 1680, Stevenson *contra* Allans. Fountainhall, 13th January 1697, Yorston *contra* Burn.

A DISCHARGE granted by a minor without any onerous cause, was found null, altho' she might have disposed the sum in testament at that age. Durie, 25th July 1626, Lockhart *contra* Lockhart. --- What a minor cannot do even with consent of curators.
A minor cannot discharge a bond, even with consent of curators, without real payment made. Haddington, 6th February 1623, Kellie *contra* Saltcoats. --- And yet, which seems not very consistent, a promise to discharge a debt gratuitously was sustained against a minor. Spotiswood, (*Marriage*) 15th January 1634, Seton *contra* Hepburn. --- And a bond of cautionry was sustained, granted by a minor with consent of curators. Stair, 20th February 1672, Carstairs *contra* Moncrief. --- And in another case, the bond of cautionry was cut down, for this reason only, that it was interposed in behalf of the curator himself, who could not authorise a deed in his own favours. Stair, Dirleton, 7th December 1666, M'Kenzie *contra* Fairholm.

A MINOR institute in a bond cannot, during his minority, alter the substitution. Fountainhall, 18th November 1697, Yorston *contra* Burn and Shiel. --- A bond of provision in favour of a daughter, being so qualified, "that she should not assign gratuitously, and dying without heirs of her body, or without disposing for onerous causes, the same should return to the granter's heir;" and she pursuing a constitution of the debt against the heir, was found entitled to uplift in her minority only the annualrents, and not the principal sum, unless for an onerous cause. Forbes, 24th January 1706, Schaw *contra* Schaw. --- A minor, even with consent of curators, cannot gratuitously alter the settlements of his estate. Home, 26th January 1726, Marquis of Clidisdale *contra* Earl Dundonald. --- A remuneratory donation of two small tenements in the town of Air, granted by William Hunter, a minor, above twenty years of age, to his brother uterine, was reduced at

the instance of the heir, upon this *medium*, That a minor tho' he has power to test upon moveables, can do no gratuitous deed in prejudice of his heir. 24th December 1728, Hunter *contra* .----A man in his second contract of marriage obliged himself, "to lay out a certain sum upon good security in lands, to himself and his future spouse, and to the children to be procreated betwixt them; which failing, the same to accresce, pertain, and belong to the husband's nearest heirs and assignees;" in a pursuit at the instance of the heir of this marriage, being minor, for the above sum against the heir of the first marriage, found, The pursuer might uplift the sums pursued for, but that he could not in his minority gratuitously defeat the substitution; but found no necessity at present to determine what might be competent to him after his majority. 29th January 1731, M'Culloch *contra* M'Culloch. ----One, whose effects consisted all in moveables, made a settlement of the same in favours of his son and daughter *equally betwixt them, and failing of either by decease, before marriage or majority, to the survivor, their heirs, executors, or assignies*. The son died in minority, after settling his half in a chanel different from his father's destination; and it was found, That he, having died minor and unmarried, could not, by any deed of his, disappoint the father's destination. The Lords seemed to be of opinion, That notwithstanding of a substitution in moveables, the institute may, in minority, test thereupon; but the speciality in the present case, was thought to ly in this, that here was more than a simple substitution, that there was implied a prohibition to alter before majority or marriage. 16th January 1739, Waddel *contra* Waddel.

Minor wanting curators.

THE Lords allowed a minor to renounce to be heir to his predecessor, altho' he wanted curators, and declared, That they would not thereafter restore him against his renunciation till the debt were first paid *cum omni causa*. Auchinleck, (*Minor*) 13th July 1631, *contra* .----The Lords sustained a confirmed testament, where the nearest of kin, who were pupils, were surrogated to the procurator fiscal, without being authorised by tutors for that effect, notwithstanding the act 26th, parl. 1690. Forbes, 23d July 1707, Alison *contra* children of Pitcullo.

A BOND of borrowed money being taken payable to a tutor for his pupil's behoof, and after the years of pupilarity the minor having charged for the same with concurrence of his *quondam* tutor, the debtor suspended upon this reason, That the minor not having chosen curators, there was none authorised to give him a valid discharge, and cited the authority of l. 7. § 2, *de Minoribus, Si minor conveniat debitorem, adhibere debet curatores ut iis solvatur pecunia, alias non compellitur solvere*.----The Lords found the money, being payable to the *quondam* tutor, the interposition of his authority was sufficient warrant for the debtor to pay. Fountainhall, ult. December 1697, Wait *contra* Panton.

Deeds in minority when *ipso jure* null, when requiring a *restitutio in integrum*.

A MINOR having alienated lands without consent of his curators, the Lords found, That altho' he had been silent for many years after the *quadriennium utile* was expired, yet he might pursue *via ordinaria*, to get the alienation declared null *ab initio*; and that the circumscribing minors within the *quadriennium*, is only in case they need the

the *remedium extraordinarium* of a reduction. Colvil, January 1584, Robertson *contra* Oswald.---- The Lords found, That alienation of lands made by a minor *sine decreto*, cannot be reduced *elapso quinquennio post maiorem aetatem*, conform to the common law. Sinclair, 4th March 1543, Glentoirs *contra* Ld. Kirkpatrick.---- The same found in case of *lapsus quadriennii*. Maitland, 6th March 1561, Grundiston *contra* Lawson.---- But if the minor be an infant, the Lords found the deed to be *ipso jure* null, so that there is no need of a reduction. Colvil, 24th January 1577, Bruce *contra* .---- Alienation by a minor having curators, was found *ipso jure* null, done without their consent; but if the minor has none, the alienation subsists, until revoked and reduced. Maitland, 17th March 1561, Kincaid *contra* .---- In a reduction pursued by a minor's successor of an alienation of lands, made by the minor and his curator, without the sentence of a judge, as being a necessary solemnity in such alienations; the Lords refused to sustain this reason of reduction, unless the pursuer would join therewith lesion; and found also, That this ought to be pursued within the *quadriennium utile*. Durie, 2d February 1630, Hamilton *contra* Sharp. Auchinleck, (*Minor*) 21st July 1631, Earl Kinghorn *contra* Strang.---- The Lords found a disposition made of a wadset by a minor with consent of his curator, not to be null in law, tho' there was no *decretum judicis* interposed; but found, That it was only reducible upon minority and lesion; because, tho' a pupil or his tutor can alienate nothing without the authority of a judge, yet it is no legal nullity, where a minor, either wanting curators, or with their consent, where he has them, alienates heretage without the warrant and cognition of a judge. Fountainhall, 6th December 1699, creditors of Clark *contra* Gordon. Stair, 13th December 1666, Thomson *contra* Stevenfon.

A BOND granted by a minor without his curators consent, was found *ipso jure* null; and therefore, altho' no revocation was made, nor process intended *intra annos utiles*, the Lords found, That he might still use the alledgeance. Colvil, February 1587, Hamiltons *contra* Hamilton.---- A bond granted by a minor as cautioner for his father, who was administrator in law, found null, and that the *quadriennium utile* being elapsed did not bar reduction. Dirleton, 26th July 1666, M'Kenzie *contra* Fairholm. Stair, Dirleton, 7th December 1666, *inter eosdem*. Stair, 24th February 1672, Corser *contra* Deans.---- A minor *in familia* with his father, having attested a cautioner in a suspension, without his father's concurrence, and being pursued for the debt, proponed this defence, That his deed was *ipso jure* null. It was answered, That deeds by minors without their father's consent as administrator are not *ipso jure* null, but need reduction, and now the *quadriennium utile* is past without any challenge made to the obligation. The Lords found the attester's obligation *ipso jure* null,

January 1728, Bell *contra* Sutherland of Riarchar.---- A son who was minor, first granting an assignation of a sum to his father, and thereafter when major granting a second assignation thereof to his uncle's daughter, but neglecting formally to revoke the first, as judging it null, because therein his father had become *auctor in rem suam*; yet the Lords found, That the first assignation was not simply null, but only revocable and reducible; and seeing that no reduction was raised within

the *quadriennium utile*, they preferred the first assignation. Fountainhall, 19th January 1704, Bannantine *contra* Trotter.

Process at a minor's instance to sell his land for payment of debt.

A MINOR past the years of pupillarity, brought a process before the court of session, in order to obtain the Lords authority for selling part of his estate for payment of his debts; the difficulty was, that an action of this nature is competent only to a pupil and his tutors, who cannot sell without such authority, but that a minor, with or without curators, may dispose of his estate without any authority; the Lords repelled the objection, and found process competent at the instance of a minor, in the same way and manner as at the instance of a pupil, 17th February 1738, Campbell *contra* Sir James Campbell.

Lesion how it must be qualified, to found a *restitutio integrum*. And 1mo. Lesion in extra-judicial proceedings.

'Tis not sufficient to bar reduction upon minority and lesion, of a sale made by a minor, that the price was truly paid, unless it be offered further to be instructed, That the same was profitably employed for the minor's use. Dirleton, 12th December 1666, Thomson *contra* Stevenson ---- The like with regard to a bond of borrowed money, tho' the sum was truly told down to the minor and his curators. Stair, Dirleton, 2d July 1667, Lord Blantyre *contra* Walkinshaw. ---- In a reduction of an assignation, upon minority and lesion, it was not sustained, That an equivalent sum was paid for the right, unless it were also offered to be proved, that the sum was profitably employed to the minor's use. Stair, 19th July 1672, Ruthven *contra* Gray. ---- The like. Durie, 25th January 1631, Houston *contra* Maxwell. ---- The Lords refused to restore a minor *in integrum* against a bond granted for the price of goods, in respect he qualified no lesion, but only that the goods had been shipwrecked after the date of the bond. Hope, (Minor) July 1614, Edgar *contra* executors of Edgar. ---- In a reduction, at the instance of a minor, of a debt contracted for mournings he had taken off from a merchant, wherein he was so far lesed, that they were not for himself but for his younger brother and sister, whom he was not bound to furnish, having, since his majority, discovered his father's estate to be overburdened, and thereupon timously revoked; the Lords repelled the reason of minority in this case, and found him liable, reserving his action for repayment against his brother and sister as accords. Fountainhall, 14th July 1705, M'Doual *contra* Marshall ---- The Lords refused to reduce a bond, upon the head of minority and lesion, in regard the bond was a corroboration of a debt due by the minor's father, who had disposed to him his estate, with the burden of his debts, which the minor had undertaken to pay in his contract of marriage, and the said contract was not reduced. Home, March 1684, Henderson *contra* Dryburgh.

A HUSBAND having provided his wife in the liferent of his whole means and conquest, and obliged himself to pay 5000 merks to her father, in case there were no children of the marriage, and he insisting to reduce the contract, because he was minor when he entred into it, and was lesed, having got only 1000 merks of tocher: The contract was reduced as to the obligation to the father-in-law, but not as to the wife's provision; tho' it was alledged, That the children, if there were any, would be prejudged by the wife's total liferent; in regard that the existence of children was an uncertainty, and if they should exist, the mother would be liable in a suitable modification for their aliment and

and education. Durie, Auchinleck (*Marriage*) 4th July 1632, Davidson *contra* Hamilton. See Stair, 22d November 1664, M'Gill *contra* Ruthven. Gosford, 23d February 1669, Gordon *contra* Gordon. ---- A minor heiress, with consent of curators, having provided a husband with a competent liferent out of her lands, this was not found lesion. Falconer, 27th February 1683, Montgomery *contra* Earl Leven. ---- In a reduction at the instance of a wife upon minority and lesion, in a competition with the husband's creditors, libelling upon her disposing in her contract of marriage, at the age of 17, all her heretage, and the husband binding for a suitable jointure; yet that soon after the marriage it appeared, that he was worth nothing, having first retired to the Abbey, and then to Flanders to be a soldier; and his creditors having seiz'd on his whole estate, she and her children were left miserable; and the creditors alledging, That she could not say she was lesed, being provided to a competent jointure. To which it was answered, That she was enormly lesed, by denuding of her estate, to be carried off by his creditors; and her jointure was but a name, nothing being left, either for her liferent or childrens provisions. The Lords repelled that defence, and found the minority and lesion proved, and reduced the contract, in so far as concerned the disposition she had given of her own estate, only this did not take from the husband and his creditors the *jus mariti* to the rents of the lands during the standing of the marriage, and until the husband's death. Forbes, 27th, Fountainhall, 28th July 1708, Byres *contra* Reid. ---- An heiress marrying at the age of 16, without consent of her mother, and nine months thereafter a contract being made, whereby she disposes her heretage *nomine dotis*, and the husband binding himself to have in readiness a suitable sum of money, and to take it to her in liferent, and to the children in fee, without any provision to her of the liferent of her own lands, but giving her the liferent of half the conquest, the husband being *oberatus*, and giving to his creditors infestment out of the lands, and dying, leaving children; in a reduction of this contract at her instance, upon minority and lesion, the Lords sustained this reason, and therefore admitted her to liferent the lands she brought along with her; but whether the fee of the lands would belong to her children, or to her husband's creditors after her death, was not decided. Fountainhall, 14th, Forbes 25th July 1710, Chalmers *contra* Lyon's creditors. ---- Thereafter the husband's creditors having adjudged the lands after his decease, as in his *hereditas jacens*; the Lords, in a competition betwixt them and the relict, sustained her reason of reduction of the fee, as they had done of the liferent, upon minority and lesion, unless the creditors would undertake to make out that the husband had a stock at the time of the contract for securing the wife in a liferent, tho' afterwards his means fail'd. Bruce, 12th November 1714, *inter eosdem*.

SOME years annualrent being resting to a minor upon an heretable bond, he not obtaining ready payment from the debtor, granted him a discharge thereof, and took his moveable bond for the same, bearing interest; the debtor soon thereafter becoming bankrupt, the minor intended reduction *intera annos utiles*; and the lesion condescended on was, That he discharged the annualrent arising from the heretable bond, whereas he ought to have taken a personal bond of corroboration in further security of these annualrents, without granting any discharge, which no man of experience would have neglected, being a method calculated to secure the creditor, without bringing any additional bur-

den upon the debtor. The reduction was sustained. 29th January 1729, Moncrief *contra* creditors of Mitchel of Balbardie.

IN a declarator of recognition, founded upon an alienation to a second son an infant, who afterwards, by the death of his elder brother, became apparent heir; the Lords repelled the exception of minority and lesion, because minors can only be restored against their own deeds, not against the deeds of third parties, tho', *ex accidenti*, the deeds may happen to be to their prejudice. And here the infestment was purely the deed of the father, which was valid, without necessity of acceptance upon the son's part. Stair, 30th January 1663, Lady Carnagie *contra* Lord Cranburn.

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ONE having become bound as cautioner for the faithful administration of a person, who got an office *durante bene placito*, and the representatives of the cautioner being pursued for acts of mal-administration, which happened after the cautioner's death; the defence was, That the defenders were pupils, that their tutor ought to have withdrawn the bond of cautionry, since their predecessor was not bound longer than he had a mind, and that against this omission they fall to be restored upon the head of minority and lesion. It was answered, That there was no direct lesion in omitting to withdraw the bond of cautionry; that it proved to be lesion accidentally only by the principal party's bankruptcy, and our law does not restore minors against accidental lesion, witness the case where a tutor neglects to lead an adjudication for the behoof of his pupil. The Lords repelled the defence. 22d December 1739, Colonel Erskine *contra* Erskines.

THE Lords found, That tho' a tutor raise briefes, and cause serve his pupil heir to his predecessor, or pursue actions in his name as heir, yet the pupil thereafter may renounce. Balfour, (*Heir*) 14th March 1562, Reidheugh *contra* Reidheugh.--- The testament dative of a minor's father being given up by her mother, and she being confirmed in her minority, and never having had any intromission with the goods, the Lords found, That she might yet, being minor, renounce to be executrix *rebus integris*. Spotiswood, (*Executor*) July 1626, Drummond *contra* Logan.--- A decreet of registration being recovered against a woman, as lawfully charged to enter heir to her predecessor, and she suspending upon minority and want of curators; and now, that she had gotten them, offering to renounce; the Lords received her renunciation by way of suspension, altho' she had not intended reduction of the decreet. Spotiswood, (*Restitutio in integrum*) 25th January 1628, M'Doual *contra* Kennedy.--- A minor was allowed to renounce to be heir, altho' the creditor had obtained not only decreet against him as lawfully charged, but had thereupon comprised the lands, and obtained himself infest by the superior; but the Lords here ordained the debts and comprising to stand valid, notwithstanding the apparent heir's posterior renunciation. Auchinleck (*Minor*) 29th November 1633, Guthrie *contra* Hardrope.--- A minor pursued as charged to enter heir, offered to instruct payment of the debt, but having failed therein, when the term came to be circumduced, he was allowed notwithstanding to give in a renunciation by him and his curators. Durie, 11th June 1631, Telter *contra* Drummond.--- The like. Fountainhall, Forbes, 11th December 1705, Murray *contra* Chalmers.

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ceedings.

COMPETENT and omitted is not a proponable objection against a minor, Stair, 15th June 1680, Gordon *contra* Earl of Queensberry. Fountainhall, 20th December 1699, Logie *contra* Ker. Stair, 9th, Gosford,

Gosford, 10th February 1672, Cockburn *contra* Halyburton. In which last case the Lords avoided determining the question, Whether a minor can be restored against proponed and repelled. ---- A minor restored against an act of litiscontestation, and reponed to the defence *quod non tenetur placitare*, tho' competent and omitted. Dirleton, 15th December 1666, Hartshaw *contra* Hartwoodburn. ---- But this defence was repelled, proponed in a concluded cause, & *minor liti se obtulerat*. Fountainhall, 20th December 1679, Earl Anandale *contra* Johnston. ---- The Lords reponed a minor against a decret of circumduction of the term of eight days after it was pronounced, upon supplication, wherein was proponed an exception, *noviter veniens ad notitiam*. Hope, (*Minor*) 27th November 1624, Forrester *contra* Sinclair. ---- A decret of exoneration, obtained by a tutor against his pupil and curators, was reduced *ex capite minorennitatis & lesionis*, tho' the curators did appear and defend, several articles having been omitted by the tutor out of his charge, and several answers neglected to be proponed for the minor. Durie, 1st December 1638, Stewart *contra* Stewart. --- In a reduction of a decret *in foro*, upon this head, That the party being minor when the decret was obtained against him, his procurator had omitted this material defence, That the ground of the claim was a missive letter promising payment for another man, yet it was not holograph, and neither design'd the writer nor had witnesses; the Lords repelled this reason of reduction, and adhered to the decret *in foro*, and refused to repon the minor in this case. Fountainhall, 22d January 1705, Oakly *contra* Tailfer.

A MINOR being lesed *in facto*, by omitting to produce a contract called for in a reduction, whereupon certification followed, the Lords restored him *contra rem judicatam*. Fountainhall, 14th January 1697, Alexander *contra* Park and Ord. ---- But a decret of certification, in an improbation pronounced in absence against a minor of six years old, found irreducible, and that he could not be heard to produce. Hope, (*Improbation*) ult. January 1621, Baillie *contra* Ld. of Silvertonhill. --- A minor and her curator having intended *actionem tutelæ* against her tutor, and he having extracted a decret *absolvitur*, she raised reduction thereof upon minority, as being lesed in some articles in the compt and reckoning, and the term assigned for proving being circumduced, the minor was again restored against the circumduction, tho' it was alledged, That the circumduction of terms concerns the method and order of Processes, against which minors should have no privilege. Marcus, (*Minority*) November 1683, Lady Balgerno *contra* Lady Ross.

A REPROBATOR not protested for at the examining of the witnesses, being craved after the cause was concluded, but before advising upon this speciality, that the defender was a minor, and so ought to be reponed against the omission. Answered, The time of protesting being among the solemnities and methods of process, the minor ought to have no benefit of restitution, especially seeing the party has this prejudice, that he cannot now adduce new witnesses before conclusion of the cause, which he might have done, had the faith of his witness been called in question by a protestation for *reprobator debito tempore*; and the minor has recourse against his tutors and curators who were present at the examining of the witnesses, and did not protest when they heard the *initialia*. The Lords refused to sustain *reprobator*. Home, November 1683, Falconer, Marcus, (*Reprobators*)

25th February 1684, Newton *contra* Paip. ---- A minor's procurator having rashly referred a point to the other party's oath, whereas the presumption lay on the minor's side; and the party having accordingly deponed, and the minor then objecting, that he disclaimed the debate made for him, as being plainly lesed thereby, and therefore craving to be reponed, as had often been done in the like case; the Lords, tho' they saw that the process was mismanaged, yet *quia juratum erat*, the refused now to repone him. Fountainhall, 7th November 1699, Cuby *contra* Cubies.

A MINOR craving restitution against a decret *in foro*, upon alledged iniquity in the interlocutors, the Lords refused to repone him to any defence that was proponed and repelled; but allowed the decret to be opened as to any objection omitted either in fact or in law. Fountainhall, 7th January 1698, Countess of Kincardin *contra* Purvis. ---- A decret having been obtained against a common debtor during the minority of another creditor, reduction was intended of the same upon minority and lesion; and it was pleaded for the creditor-reducer, That the decret was iniquous, an obvious objection lying against the claim upon which it was founded, and that he had an interest to reduce, in regard that at the time of establishing this unjust debt, the common debtor had not sufficiency of funds to satisfy both. It was answered, That the very objection now founded on was proponed by the common debtor himself, and repelled, and minors are never restored against proponed and repelled. And *esto* it had been omitted, minors are only restored to their defences which were competent and omitted in processes against themselves, where their interest is direct, but not where the process is against a third party, tho' such a process may occasionally affect their interest, because this would tend to make pleas endless. The Lords assilzied from the reason of reduction. 14th January 1732, Anderson *contra* Geddes.

No restitution till the other party be also restored.

A MINOR insisting upon minority and lesion, must first make offer of what he received in contemplation of the bargain. Colvil, 26th June 1576, M'William *contra* Shaw. ---- A minor during his pupilary having been served heir to his father, but now with concurrence of his curators raising reduction of that service upon minority and lesion, finding his estate overburdened; and his father's creditors consenting to his restitution, only contending, that it must be mutual, so that he must accompt for the rents of his father's estate intromitted with by him and his curators; and he offering to accompt only for what was really *in rem versum* of himself, but not for what his curators had squandered and imbazled, they being now broken and insolvent; the Lords found the case very strait betwixt the favour of minors on the one side, and of creditors on the other, yet they refused to restore the minor against his service, except he accompted to the creditors for the rents, whether applied to his utility or not. Fountainhall, Forbes, 1st December 1708, creditors of Rothemay *contra* Gordon *alias* Barclay.

A minor dealing in traffic or other business, if he can be restored?

THE Lords found, That a bond having been granted by two persons conjunctly and severally, being merchants, and for the price of merchant-ware; the same could not be questioned on this head, that one of them was minor at granting, he having been then, and thereafter a trafficking merchant. Dirleton, Stair, Gosford, 20th June 1676, Galbraith

Galbraith *contra* Leslie. ---- The defender was affoizied from a reduction of a bill granted to him for the price of goods sold by him to a minor who was a trading merchant at the time, tho' in fact the minor was employed by a third party to buy the goods for him, who accordingly received the same; and therefore in effect the minor was but a cautioner, but this the feller knew nothing about. 14th July 1732, Grieve *contra* Tait. ---- A bill being challenged as granted in minority, the Lords found it relevant to sustain the bill, That the acceptor was bred a merchant, and was trading at the time of the bill in question: For drawing and accepting of bills of exchange, is of itself a branch of trade, the money must be presumed advanced *in artis suæ vel mercaturæ exercitio*; and if this presumption be not sustained, a minor merchant cannot deal otherwise than by ready money, which in effect is saying, That a minor cannot be a merchant. 5th July 1732, Craig *contra* Grant.

A BOND granted by a minor without consent of his father administrator, found null, tho' the minor was a notary and a messenger, and therefore of presumed ability. Stair, 24th February 1672, Corser *contra* Deans. ---- In a reduction of a bond upon minority and lesion, it being objected, That the minor at granting was a writer, and attendant about the session, and therefore ought not to be restored; the Lords found, That this did not exclude him from the benefit of restitution upon minority and lesion, but they ordained the charger to depone, that the articles of the accompt, for the balance of which the bond was granted, were at the common rates and not exorbitant. Fountainhall, 11th November 1697, Henderson *contra* Lathraigh. ---- A bill accepted by a minor without consent of his father as administrator in law to him, as the price of merchant goods sold to another, was reduced upon minority and lesion, altho' the sum was small, and the acceptor was a writer doing business for others, and had paid a part of the sum during his minority. Forbes, 17th January 1711, Dundas *contra* Allan. ---- A minor having signed cautioner to a deed without consent of curators, the Lords sustained the nullity, tho' it was offered to be proved, that at the time of signing he was habite and repute major, kept shop, was married, and had publick trade for some time before he became cautioner. July 1724, Wat *contra* Brownlie. ---- A bond granted by a minor without consent of his father administrator in law, was found void and null, tho' at that time he was *majorrenniti proximus*, and had a post in the army. 15th January 1731, Campbell *contra* Lord Lovat.

AN alledgeance that a minor affirmed himself to be major at the time of granting a bond, is a relevant defence against him pursuing a reduction *ex capite minoritatis & læsionis*. Durie, ult. February 1637, Weemyss *contra* creditors. Minor affirming himself to be major.

A POOR young man having signed a bond with his father, while in *familia*, and but eighteen years old, and having revoked within the *annus utilis*, the reason was not sustained by way of suspension, because he had not intended summons of restitution with those years, nor reduction upon the revocation; and the Lords found, That the reason of suspension upon the revocation, tho' done *intra annos utiles*, interrupted not. Durie, 16th November 1630, Murray *contra* Cochran. N. B. Auchinleck,

chinleck, (*Minor*) observes this decision as if the contrary had been found.---- A reduction upon minority and lesion was not sustained, not being raised within the *anni utiles*, tho' the pursuer had revoked within that time. Stair, Gosford, 25th January 1672, Ramsay *contra* Maxwell. ---- A minor of seventeen years old having bought a bargain of timber in conjunction with his father, and both having granted their bond for the price ; in a reduction thereof upon minority and lesion, the Lords assailed the defender, because that, tho' the minor had revoked, yet the reduction was not executed *intra annos utiles*, besides, that he had homologated after majority, by assigning the bargain over to another. Fountainhall, 28th December 1697, Marquis of Montrose and Buchannan *contra* Livingston. --- The Lords sustained a minor's revocation *intra annos utiles*, and suspension of a bond granted by him as equivalent to a reduction. Marcus, (*Minority*) January 1685, *contra*.

THE Lords found, That the raising and executing a reduction *intra annos utiles* by a minor, was sufficient to interrupt the prescription, tho' the instance was perished, and the process fallen, not having been called within year and day, the pursuer being at liberty to raise a new reduction, tho' the *anni utiles* were long elapsed. Falconer, 16th December 1681, Home, March 1682, Arburthnot *contra* M'Dowal.

A PARTY raising suspension of a decret against him as lawfully charged to enter heir to his predecessor, as also raising reduction, the reason whereof was non-compearance, minority, lesion, &c. which he did as soon as the decret came to his knowledge ; the Lords, notwithstanding it was not intended *intra annos utiles*, sustained the libel, and reponed him yet to produce a lawful renunciation *cum sese non immiscuisset bonis*, neither had any diligence followed on that decret. Spotiswood, (*Restitutio in integrum*) 20th July 1626, Baron *contra* Harvie. --- The like. Stair, 17th July 1661, relict of Fleming *contra* Forresters.

Recourse against curators bars not reduction.

THO' the curators may be bound *actione curatela* to make up the minor's loss, this does not bar the reduction *ex capite minorennitatis & laesionis*. Durie, 7th March 1637, Vernock *contra* Hamilton. Durie, 1st December 1638, Stewart *contra* Stewart. Stair, 2d July 1667, Lord Blantyre *contra* Walkinshaw.

If this reduction takes effect *ab initio*, or only from decret?

IN a reduction upon minority and lesion of a contract entred into betwixt the pursuer's tutors and curators and the relict, giving her a certain annual duty for her liferent of the coal ; the right was reduced, but the lady was assailed from bygones. Stair, 16th February 1666, Earl of Winton *contra* Countess of Winton. --- A girl fourteen years of age at most, having sold her land, without the authority of a judge, the disposition was reduced from the beginning, and not from the time of liti-contestation only, as the defender insisted ; but here the disposition was understood to be *ipso jure* null. Durie, 25th July 1631, Houston *contra* Maxwell.

Minority interrupts expiry of the legal.

A MINOR succeeding to a minor, who deceased during the *quadriennium utile*, has not only all his own minority, but also as much of the *quadriennium* as remained to his predecessor to reduce any deeds done

done by his predeceffor in his minority. Durie, 14th March 1628, M'Math *contra* Baron of Brughton.

FOUND, That the privilege competent by act of parl. to minors, to redeem comprifings led againft them at any time within their 25th year, was to be extended to comprifings, led not only againft the minor himfelf, but againft his predeceffor who was of perfect age. Auchinleck, (*Comprifing*) 28th January 1630, Pringle *contra* Riddel.--- A minor fucceeding to the legal reverfion of an apprifing by a pofterior apprifing, has not only the privilege of redemption in the right of his predeceffor if he was minor, but of his own minority, during which the legal reverfion runneth not againft him. Stair, 4th December 1677, Oliphant *contra* Hamilton.---- The legal of an apprifing current in January 1652, being by act 1661, prorogated until Whitsunday 1664, and the apprifing dying during the time the prorogated legal was current; the queftion occured, If the prorogated legal would run againft his heir being a minor? If it did, the apprifing would ftand as a right of property; if not, it would be extinguifhed by intromiffion within the legal, as it was further prorogated by a long minority. It was pled for the adjudger, That the privilege introduced by act 1661, was no more but a faculty of redemption for three years, which being *stricti juris*, cannot be extended even in favours of minors; they not being mentioned in the act. Answered, That a prorogation of the legal was intended in the moft proper fenfe of the word, and a prorogated legal muft be of the fame nature with the original legal prorogated, fo as not to run againft minors. The Lords found, That the legal of apprifings prorogated by the act until Whitsunday 1664, do not run againft minors, 7th December 1736, Ramsay *contra* Brownlie.

THE Lords found, That a minor *majorennitati proximus*, offering himfelf as cautioner to the fife, cannot enjoy his privilege to his majesty's prejudice (the fife being alfo privileged) upon alledgeance, That he was *minor curatores habens*. Haddington, 21ft February 1593, Forous *contra* Gourlay and Stevenfon.

Privilegiatus contra privilegium.

IF a pupil may be made an instrumentary witnefs. See Writ.

BOND granted by a minor proves not its onerous caufe. See Proof.

PASSIVE titles incurred by a pupil. See Tutor and Pupil.

PRESCRIPTION in what cafes it runs againft minors. See Prefcription.

QUADRIENNIUM utile if it runs againft a married woman. See Husband and Wife.

MINOR NON TENETUR, &c.

HERETAGE in the maxim is to be ftrictly taken of the property of lands upon which infeftment has paff; and therefore the privilege was not fufained where neither the defunct's predeceffor

In what cafes the privilege competent,

was infeft, nor the defender his heir. Stair, 31st January 1665, Kello *contra* Pringle. Stair, 27th November 1678, Guthrie *contra* Ld. of Guthrie. Falconer, Fountainhall, Home, 20th November 1683, Fleeming *contra* Carstairs. --- But it was sustained where the heir was infeft, tho' the predecessor was not. Durie, Spotiswood, (*Minor*) Hope, (*Minor*) 23d June 1625, Pringle *contra* Ker. --- And it was sustained to an apparent heir where the predecessor died infeft; because otherwise minors in ward-lands could not enjoy the privilege at all. Haddington, 20th February 1610, Annand *contra* Ld. Effilmont. Spotiswood, (*Minor*) 17th January 1634, Earl Mar *contra* his vassals. --- And the objection was repelled, That the minor's father's author was never infeft, seeing the father died infeft. Stair, 18th January 1667, Chapman *contra* White. --- An heir who has right to the estate by disposition from his defunct predecessor not entitled to the privilege. Gosford, 8th July 1676, Zeaman *contra* children of Oliphant. Maitland, 28th June 1551, Lord Angus *contra* Ker. --- A minor having pled this privilege in bar of a *reduction ex capite inhibitionis* of a real security granted to his father as creditor, and of which he died in possession; it was answered, That the maxim takes place only in rights of property, not in wadsets and redeemable rights. The Lords sustained the defence. Fountainhall, 21st November 1694, Davidson *contra* Auldcorn.

If competent to a minor whose interest is only consequential.

A CONTRACT of alienation of lands being made, and several subaltern rights and infeftments granted to others thereupon; one of the acquirers of these subaltern rights being dead, and his son minor; the Lords found, in a reduction of the principal contract, That the minor *non tenebatur placitare super hæreditate paterna*, altho' his right only depended upon another original, and so could fall only in consequence. Durie, 25th November 1624, Hamilton *contra* Matthison. --- The like. Durie, 23d June 1625, Pringle *contra* Ker.

If to a major whose interest is connected with that of the minor.

THE Lords found, That not only *minor non tenetur placitare super hæreditate paterna*, when he bruiks *pro indiviso* with a major; but even that the major in that case is not obliged to answer. Sinclair, 22d March 1541, Lindsay *contra* Cheynes. --- A purchaser of land who had granted a subaltern right to a minor's predecessor, being attacked in a reduction, was found not to have the privilege of stopping process until the minor's majority; tho' if the reduction should succeed, it behoved to affect the minor's interest. Durie, Hope, (*Minor*) 25th November 1624, Hamilton *contra* Matthison. --- And in such another case the minor having granted a subaltern right to a major, this privilege was refused to the major, because the minor could sustain no prejudice by the reduction of the major's right, being only obliged in warrandice from his own proper fact and deed. Durie, 14th July 1626, Stewart *contra* Earl Home. --- The Lords found this brocard sufficient to defend the minor's mother; because, he, the son, would be obliged to warrant her liferent to her. Spotiswood, (*Minor*) 17th January 1634, Earl Mar *contra* his vassals. See Durie, 21st March 1628, Balmanno *contra* Yule, where the defence was repelled; but in that case it does not appear the minor was bound to warrant his mother's liferent. --- A minor *fiar* being bound to warrant a liferent to a liferentrix; the Lords, in a reduction of the liferentrix's right, repelled the

the alledgeance of *minor non tenetur placitare*; because the privilege is purely personal, and when the minor is directly pursued himself, and not when he becomes liable only in consequence; yet their Lordships declared, That this should be without prejudice of the minor's right as accords. Newbyth, Gilmour, 8th, Stair, 15th July 1665, Borthwick *contra* Skeen.

A MINOR has no privilege to defend him from producing his writs in an exhibition, which concludes no challenge of his right to his predecessor's estate, being calculated only to force production. Colvil, July 1582, Fleming *contra* Lord Fleming. Fountainhall, 1st February 1710, Crawford *contra* Crawford. --- Nor is the brocard relevant against production in a reduction, because all defences are reserved when the pursuer comes to insist in his reasons of reduction. Spotiswood, (*Reduction*) 12th March 1628, Balmano *contra* Yule. --- And the same holds in a reduction and improbation. Gosford, 8th January 1670, Wilkie *contra* Anderson. Stair, 27th November 1678, Guthrie *contra* Ld. Guthrie. --- In all events, where the minor himself is not infest, he must produce the predecessors infestment to evidence that it is *hereditas paterna*, without which he cannot have the benefit of the exception. Stair, Newbyth, 31st January 1665, Kellie *contra* Home.

IN the proving the tenor of a charter against a minor, the Lords had no respect to the brocard, *minor non tenetur placitare super hereditate paterna*, altho' the action seem'd to be like to a reduction; because, if the pursuer prevailed, the charter would stand good against the defender, and so would take his heretage from him; but the Lords so found, in regard that this action only put the pursuer in the same case he was in before the charter was lost. Spotiswood, (*Proving the tenor*) Durie, Hope, (*Minor*) 15th February 1628, Master of Edinburgh *contra* Earl of Home.

THE brocard was found not to take place, where a minor was only pursued to append the seal to a charter already sign'd by his predecessor, and to grant a precept thereupon. Colvil, May 1582, Ld. Ormiston *contra* Ld. Calder. --- The Lords found the brocard took no place, where the minor's father had obliged himself by contract to infest the pursuer. Spotiswood, (*Minor*) July 1583, Hamilton *contra* Ld. Cambuskeith. --- A man having sold lands, this brocard was not found to save his heir a minor from being liable for warrandice upon eviction. Falconer, 20th February 1683, Bonnar *contra* Lyon. Or in any other process for making good the purchaser's right. Fountainhall, 27th June, Forbes 25th July 1710, M'Kenzie *contra* M'Kenzie.

THIS brocard was found not to take place in a reduction upon the dole or fraud of the minor's predecessor. Sinclair, 1st March 1546, Queen's Advocate *contra* Weemyss. Sinclair, 12th February 1548, Lady Seton *contra* Cockburn. Colvil, July 1581, Scot *contra* Kincaid. Haddington, 7th January 1593, Ld. Drumquhassil *contra* Cuninghame. Haddington, March 1610, Lord Sanquhar *contra* Ld. Johnston. Forbes, 27th December 1711, Crawford *contra* Crawford. --- *Minor tenetur placitare*, being called for annulling a disposition

disposition made to his predecessor after inhibition, *quia predecessor erat in dolo*. Haddington, 5th February 1607, Lord Elphinston *contra* Lord Salton. --- In a reduction upon the act of parliament 1621, against a minor, of a right granted to his father, it was alledged for the defender, That *minor non tenetur placitare*. Answered, It was *dolus paternus & fraus*, to take a disposition without an onerous cause *post contractum debitum*. The Lords sustained the minor's defence, and refused to make him find caution; which they thought to be difficult for a minor who had his lands questioned; but allowed the pursuer to lead a probation by witnesses to ly *in retentis*, which he might use in the discussing of the reduction. Marcus, (*Minority*) 4th February 1685, Gordon of Fechill *contra* Farquhar. --- In recognitions the exception *quod minor non tenetur placitare, &c.* was found not receivable; because that exception is only competent *contra breve de recto*, such as reductions, whereby the minor's ground-right is quarrelled: But in recognitions his right is acknowledged, and the penalty of his failzie is only pursued for. Haddington, 22d February 1609, Hepburn *contra* Rule. Stair, Fountainhall, 28th January 1681, Dun *contra* Scot. --- A superior pursuing reduction of a feu-charter *ob non solutum canonem*, the defence was repelled. Haddington, 25th June 1613, Ld. Madertie *contra* his vassal. --- In a reduction of a feu upon the clause irritant, the Lords found, That a minor *tenetur placitare*, because he was conven'd for his father's fault *ex mora conventionali*; but they inclined to the contrary, where the *mora* was *ex lege*. Hope, (*Minor*) 19th November 1624, Lord Inchaffrey *contra* Mitchell. --- Yet afterwards the defence was repelled, tho' the pursuit was only upon the act, and no conventional irritancy. Durie, Auchinleck, (*Heir*) 20th February 1633, Lenox *contra* M'Moran.

Bars not actions the minor is liable to from the nature of his right.

FOUND, That *minor tenetur placitare super hereditate paterna*, in actions that concern redemption of lands from minors. Haddington, February 1593, Forous *contra* Gourlay and Stevenson. --- This privilege was not found competent to exclude a wife's revocation of a donation granted to her husband, and falling by his death to his heir a minor. Stair, Fountainhall, 15th February 1678, Gordon *contra* Maxwell.

No privilege where action was commenced against the defunct.

THE brocard was found to fail in a case where litiscontestation was made with the minor's predecessor. Balfour, (*Minor*) 9th, Colvil, 16th November 1574, abbot of Dunfermline *contra* heirs of Crichton. --- The Lords found, That *minor tenetur placitare*, if the heretage was questioned by a pursuit intended against his predecessor. Gosford, 8th July 1676, Zeaman *contra* relict and children of Oliphant.

Where the minor is the first provoker.

THE laird of Aberlady having got a right to the patronage of a church, which was anciently a patrimonial church of the bishoprick of Dunkeld, and resigned in the king's hand in the 1595, in favours of Aberlady's authors, and contained in his several rights and infeftments from the king; the now bishop of the diocese raised reduction of the said right of patronage, as being a dilapidation of the patrimony of his church. Alledged for the defender, That he is minor, and therefore *non tenetur placitare*. Answered, Minors are only privileged from answering in reductions of rights of lands and property. K. William's

liam's statutes, *cap. 39. Regiam majest. lib. 3. cap. 32. n. 17.* and the subject of the present reduction is but a patronage, which is an inconsiderable right, and nothing profitable. *2do*, The defender first provoked to judgment, by raising process for declaring, that the pursuer ought to collate the person whom the defender had presented to be minister. The Lords found, That the defender *tenetur placitare* in this case, in respect he was the first provoker; and that altho' the title of his declarator was only founded on his last infestment from the king, he ought to defend the first right proceeding from the bishop, seeing all posterior rights were but consequential thereof. Marcus, (*Minority*) December 1682, bishop of Dunkeld *contra* Ld. of Aberlady and his tutors.

THIS brocard was found not to hold in case of a churchman pursuer, *quia privilegiatus contra privilegiatum suo non utitur privilegio.* Privilegiatus contra privilegiatum. Colvil, March 1580, abbot of Newbottle *contra* tenants. Sinclair, 13th May 1547, bishop of Murray *contra* Learmont. Balfour, (*Minor*) 13th May 1546, bishop of Murray *contra* provost of St. Andrews. ---- A major pursuing reduction of alienations made by him during his minority to his hurt, the Lords found, That the process ought not to be delayed by a defender minor his alledging, *quod non tenetur placitare super hereditate paterna*, because *hoc casu privilegiatus contra privilegiatum, presertim de damno vitando, certantem, non utitur suo privilegio.* Haddington, 17th January 1619, Ld. Rosyth *contra* . ---- One minor having obtained decret of removing against another, and thereby entered into possession, the defence, *minor non tenetur placitare*, was found not sufficient to defend him from reduction of the decret, and restoring the possession, because this reduction was in defence of the minor who was first in possession his right, and his own and his father's possession; and therefore the other minors ought either to restore possession, or dispute his right. Stair, 18th June 1680, Lyel *contra* Dons.

WHERE the minor's father was infest upon a charter from the king of forfeited lands, against which forfeiture the party was restored in parliament, the Lords refused to sustain the brocard, because they thought it hard that a man should be forfeited wrongously, and yet not come by his own through the minority of the contradictor. Spotiswood, (*Minor*) 1546, Hamilton *contra* Ld. Gaston. Sinclair, 11th December 1545, Paton *contra* Ld. Gaston. A forfeited person restored per modum justitie, pursuing for recovery of his estate.

MORTIFICATION.

A MORTIFICATION being made for keeping idle boys at work, the Lords found, That the turning it from a woollen to a linen manufactory, was an inversion of the mortification; and found also, That it was a lawful management, and good act of administration, to set the said mortification in tack, and therefore sustained the said tack. Fountainhall, 22d November 1698, town of Edinburgh *contra* Binning and others.

M O V E A B L E S.

Symbolical
delivery.

THE Lords preferred a prior disposition, with only symbolical possession, to a posterior, clothed with natural possession. Home, February 1682, *Gray contra Cowie*.---A disposition of sheep and other moveable goods, granted for relief of cautionry, with symbolical possession, was found not sufficient to bar a posterior sale of the same goods with actual delivery. Tho' some of the Lords demurred if this was not a good constitution of an hypothec, seeing retention of possession is an argument of simulation, where the conveyance is absolute, not where it is only in security; but the Lords generally agreed, that conventional hypothecs upon moveables, as destructive to commerce, ought not to be indulged. Fountainhall, 22d January 1695, *Ker contra Eliot*.---- Disposition of moveables to a creditor for security, with symbolical possession, found not to bar another creditor who poided the goods some years thereafter in the common debtor's possession, because the property was not transferred by the symbolical possession. Dalrymple, Forbes MS. 17th June 1714, *Carle contra Halyburton*.

*Traditio bre-
vis manus.*

IN the vendition of a ship there was found no necessity of tradition, the buyer being already in possession as a part owner. Stair, 16th June 1681, *Cathcart contra Holland*.

Delivery to
the mandatar
in the man-
dant's name.

A DECLARATION of a weigh-house clerk, bearing, That one had weighed over to another's wife a parcel of tobacco, weighing so much, and marked with the initial letters of the husband's name, was found to transmit the property to him. Forbes, 27th July 1710, *Main contra Maxwell and partners*.

*Rei vindica-
tio.*

A DECREET, whereupon goods had been poided, roused and lawfully sold, being reduced, the buyers were found obliged, tho' *bona fide* purchasers, either to restore the goods or their prices, because all that had followed on the decreet behoved to fall of consequence. Colvil, May 1583, *Beveridge contra inhabitants of Coupar*.--- Found, That jewels and other such valuable moveables being disposed of by a trustee, tho' they pass through *mille manus*, the haver is liable in restitution to the proprietary. Gilmour, January 1666, *Ramsay contra Wilfon*. Fountainhall, 3d January 1710, *Pringles contra Irvine*.---- A relict having at her own hand impignorated the defunct's moveables, and amongst the rest his heirship moveables, the heir was found to have a good action against the possessor. Stair, 24th February 1672, *Semple contra Givan*.---- The like. Stair, 28th January 1679, *Hog contra Hamilton*.---- *Rei vindicatio* sustained against one who *bona fide* bought a horse from a person to whom the proprietor lent him. Stair, 18th November 1680, *Forfyth contra Kilpatrick*. The like, tho' bought in a publick mercat. Auchinleck, (*Buying and selling*) 2d July 1629, *Bishop of Caithness contra fleshers of Edinburgh*.---- And the only security the purchaser can have, is to take borgh and hamehald from the seller according to the old laws of the realm. Durie, 19th March 1639, *Ferguson contra Forrest*.--- Theft of

of horses being pursued by way of spuilzie against the lord of the clan, it was alledged for the defender, That the horses were bought in publick mercat, with borgh and hamehald, which must assioilzie from restitution as well as spuilzie; which the Lords found relevant. Marcus, (*Spuilzie*) July 1687, Gordon *contra* Menzies.

A PARTY who bought goods *bona fide a non domino*, and again sold the same, being pursued *rei vindicatione*, for the goods or value, the Lords found the libel not relevant, unless the pursuer could alledge that the defender was in possession the time of the citation, *aut dolo desit possidere*, or that he was *lucratus*, by getting a greater price than he paid. Dalrymple, 15th June 1704, Scot *contra* Low.

THE Lords found, in the case of a right of moveables granted by a husband to his wife, with the burden of his debts, and a provision, That they should be affected with the same; that the property of the goods was settled in the person of the wife, so that she might dispose of the same; and that these who acquired right thereto were not concerned to enquire, whether the price was applied for payment of the the creditors. Dirleton, Stair, 17th December 1675, Thomson *contra* Eleis. --- The Lords found, That a jewel, or other precious moveables left to a family, on condition that it shall not be alienated, cannot be disposed of gratuitously. Falconer, 27th February 1683, Earl Leven *contra* Montgomery.

Consensual
hypotheck upon
moveables
not effectual.

IN moveables, possession presumes property. See Presumption.

DELIVERY to a mandatar in the mandatar's own name. See Surrogatum.

MULTIPLE-POINDING.

IN a suspension of double poinding, the Lords found, That the suspender could not pass therefrom in prejudice of any of the parties called; and altho' he would do it, yet that the parties might crave their rights to be discussed, which the Lords did grant. Spotiswood, (*Suspension*) 12th December 1632, Brown *contra* Lothian. --- The like. Durie, 14th January 1630, Bruce *contra* Wardlaw.

By act 3, parl. 1584, the preferable creditor who neglects to appear in a multiple-poinding, when lawfully cited, and allows a decret of preference to go out in favours of others, shall, in a reduction, have no claim for rents and profits intromitted with *medio tempore* by the other party, but only for the *foris*; at the same time, if any rents or annualrents remain *in medio* unuplifted, these will belong to the preferable creditor, bringing his reduction as said is. Stair, 27th February 1678, Campbell *contra* Bain. --- By occasion of a double poinding, the Lords took this order, That where any of the parties are not in the country, and are not cited upon sixty days, they will sustain the process, and discuss the rights of the parties compearing, with this provision, That the party preferred shall be bound, and, if need be, find caution

to refund what he shall recover to the party out of the country, if it shall be found that he has better right. Durie, 2d July 1624, Watson *contra* Lord Kinclaven. ---- A creditor preferred in a multiple-pounding, getting payment, was decerned to repete to a preferable creditor, who was not called nor compearing in the multiple-pounding. Stair, 29th November 1679, Bayn *contra* M'Millan.

MUTUAL CONTRACT.

Retention
until the other
party also per-
form.

A HUSBAND being obliged to eik a sum to the tocher, and employ both to his wife in liferent, and to the children in fee, was found to have no right after her decease to charge for the tocher, unless he eik thereto his part, and once employ the whole to the children. Gosford, 2d July 1673, Jeffray *contra* Collison. ---- All factories of their nature are revocable at the pleasure of the constituent, tho' containing a term of endurance. And tho' the factor had advanced considerable sums of money upon consideration of the factory, it was found revocable, the factor being always refounded of what he profitably expended upon consideration thereof, before he should quit the possession. Stair, 30th June 1666, Chalmers *contra* Baffily. ---- A factor is not obliged to yield possession to his constituent, or give up any subject in his hand, until he get payment of salary and debursements. And this upon a stronger footing than compensation or retention: It is founded in strict law, as being implied in the mutual contract betwixt them; and in call cases the *actio contraria* must meet the *actio directa*. As a consequence of this, if a factor sell his constituent's effects, and take the price payable to himself, he will be preferable in a competition to his constituent, so long as he has any thing to claim by the *actio contraria*: And for the same reason, he must be preferable to the constituent's creditors arresting the price in the purchaser's hand. This last point was found, 14th February 1735, Captain Stephens *contra* creditors of the York-building company. ---- One having disposed his estate, and taken a backbond of trust, in a pursuit at the instance of an adjudger of the backbond against the trustee to denude, the trustee was allowed to detain until he should be satisfied of all sums of money advanced by him for the truster's behoof; which sums were presumed to be advanced in view of the security he had by the trust-right. Stair, 18th February 1662, Earl Bedford *contra* Lord Balmerinoch. ---- A purchaser of a land-estate having taken the disposition in name of a trustee, who granted backbond, declaring the trust, and obliging himself to denude; and the trustee having thereafter advanced several sums to the purchaser, brought at last a declarator against the purchaser's creditors, concluding, that he was not bound to denude until he should be satisfied of his debts. The creditors answered, Whatever might be said, were they insisting upon the backbond to oblige him to denude, the pursuer, in the present situation of affairs, had no hold of the estate to force payment; the creditors had the possession derived to them from their debtor: And for a title, they wanted none from the pursuer; a simple declarator

rator of trust, which the trustee could not oppose, was as good to them as a conveyance from the trustee. The Lords affoizied from the declarator. 16th July 1731, Dalziel of Bins *contra* creditors of Falconer. ---- An infestment falling as being upon a contract of marriage, which was dissolved within year and day, was sustained, as being in recompence of the tocher, until the tocher should be repaid. Stair, 20th July 1664, Petrie *contra* Paul.

PROCESS was not sustained for payment of a bond, bearing to be for the price of land, until the seller should ratify the bargain at his majority, he being then minor, in respect by a separate backbond he was bound to grant this ratification. Durie, 14th November 1628, Cumming *contra* Cumming. ---- The reciprocal obligations in a mutual contract having different terms of performance, the performance of the one was not found suspended until performance of the other. Stair, 28th November 1676, Carmichael *contra* Dempster. ---- By contract of marriage the wife's father is obliged to pay a certain sum in name of tocher, and the husband and his heirs to pay a yearly annuity to the wife after his death; the tocher being arrested by a creditor of the husband's, the Lords obliged to make forthcoming, tho' it was a mutual contract, because the husband's part was fulfilled by granting a personal security for the wife's liferent, and he was not bound to make payment until the term should come. Stair, 8th February 1670, Cathcart *contra* M'Corquodail.

FAILURE of performance in a mutual contract implies no irritancy, nor is any ground for voiding the contract, but only for damages; and therefore the *mora* is still purgeable. 26th July 1729, Drummond *contra* creditors of Daes.

WHERE the one party becomes incapable to perform, the other may have it declared, that he ought to be free of the bargain, that it may not stand for ever in suspense. Stair, 13th July 1670, Raith *contra* Wolmet. ---- In mutual contracts, if either party be unable to perform, the other has a double remedy, either a process for damage and interest, or, if he pleases, a declarator, concluding, That the contract should be found void, in respect of nonperformance, and each party restored to his own place. Stair, 20th July 1675, Maitland *contra* Ld. of Gight. ---- But a purchaser having demanded performance by an instrument after the term was come in the contract, this was not found to void the bargain, he not having insisted in a process of declarator; but performance thereafter without detriment was sustained. Stair, 11th February 1676, Turnbull *contra* Rutherford.

A MAN who in his contract of marriage had become bound to secure a sum for his wife's liferent, becoming bankrupt, his creditors insisted in an action against the wife's father, for payment of the tocher stipulated to be paid to the husband in the same contract; the defence was, That the jointure and tocher being mutual causes of one another, the defender was not bound to pay the tocher, until the husband should secure his wife in a jointure: And further insisted, That seeing the husband was now bankrupt and incapable to perform, he, the defender should be declared free of his engagement, as if the contract had

not been entred into, so as to liberate him from payment, even tho' his daughter should die before her husband. It was answered for the creditors, Whatever may be the case of ordinary contracts, where each party may be restored to his original situation, contracts of marriage, which do not admit of this where marriage follows, cannot be voided by nonperformance of any article stipulated. The Lords found the defence, That the mutual cause of the portion was not performed, relevant to affoilzie the defender *hoc statu*. 4th July 1732, creditors of Watson *contra* Cameron. ---- Here they avoided determining, whether the contract would be declared dissolved by the husband's bankruptcy and inability to perform, because the defender had pled the same occasionally only, and had brought no declarator for annulling the contract; and therefore this decision goes no further than the Lords have always been in use to go in the like cases, That the husband or his creditors cannot insist for payment of the tocher until they establish the wife in a liferent, in terms of the contract, which keeps matters in suspense, and has this effect, that if the wife predecease, the obligation to pay the tocher comes to be purified; and tho' she outlive the husband, she has no better security for payment of her jointure than retention of her tocher, which seems unequal, turning all chances against her, and none against the creditors. Marcus, (*Contracts of marriage*) December 1682, Bowllie *contra* Ogilvie. Marcus, (*Contracts of Marriage*) March 1685, Lawrie *contra* Lawsons. Forbes MS. 2d February 1714, Pagan *contra* Dalziel. Fountainhall, 23d December 1703, heirs and creditors of Chalmers *contra* Hutchison. ---- In which last case it was also found, That the non-implemment of provisions to children or heirs of a marriage, will not furnish a defence against payment of the tocher to the husband's creditors, if the wife be once secured in her liferent. Which last was again found. Dalrymple 31st January 1717, Cuming *contra* Duncan. In the above cases, no more was sought by the wife or her friends, but retention of the tocher, until she should be secured in a liferent; no reduction of the contract was brought; and therefore these decisions prove neither way. ---- Upon the same plan, the husband's creditors after his decease insisting against his relict for payment of the tocher, the Lords found, That she might retain the same for security of her liferent provision. In this case, tho' the liferent provision was purified by the husband's death, the relict did not plead the point so high as to insist for voidance of the contract; she only insisted to have retention for security of her liferent, which the husband had failed to secure to her. July 1732, creditors of Hope *contra* his relict. ---- From what is above laid down, there can be no doubt, if the husband's creditors will find caution for the wife's liferent, the tocher must be made forthcoming to them. Falconer, 11th January 1682, Telfer's creditors *contra* Campbell. Fountainhall, 11th June 1712, Robertson *contra* Robertson. Durie, 28th June 1637, Galbraith *contra* Lennox. ---- In a case of this nature, where the wife had diverted upon alledged maltreatment, and where her father raised a reduction of the contract upon fraud and circumvention, the husband having had no funds to answer his engagements; the Lords found the portion subject to the wife's aliment for bygones, and likewise found it subject in time coming during the separation, in case, upon advising the probation of maltreatment, it were found that the separation was lawful and just; but did not determine whether

ther it should be subject to her aliment if the maltreatments should not be proved, and that the husband required her to adhere. Dalrymple, 31st January 1717, Cuming *contra* Duncan.

A PARTY having raised reduction of a decreet-arbitral upon the head of iniquity, it was found, That he could not afterwards take the benefit of it in a process at the other party's instance against him, and that the other party was at liberty to pass from the decreet-arbitral in his turn. Stair, 21st December 1680, Anderson *contra* Bruce. -----
A husband, during the marriage, having granted a liferent provision to his wife of 8000 merks yearly, bearing the onerous cause, That she of that date had disposed her estate to their son; and a disposition having accordingly been signed by the lady with consent of her husband, dispensing with the not delivery, in case the same should be found in the hands of either of them at their decease: But she having cancelled the same, and after her husband's decease having altered her mind, by insisting for payment of the bond, the Lords found, That the bond was voided: For she having done a deed inconsistent with the contract, the defender, who had no action to oblige her to implement, must have the privilege to repudiate in his turn. Forbes, 19th July 1711, Nicolson *contra* Sir John Schaw of Greenock. Compare 13th July 1733, Shearer *contra* Somervell, under *Fraud*.

IF, in consequence of a mutual obligation, one disposes with a procuratory and precept, process is competent to stop infestment and draw back the disposition, when the other party becomes insolvent, without power to implement the mutual cause. Home, December 1721, Selkrig *contra* Selkrig.

A PARTY having granted bond to another, wherein he binds himself to set a tack of a mill to him, provided he should pay the granter a certain sum at a certain term; the Lords, at the instance of the granter, reduced the bond for not performance of the condition; and this notwithstanding there was no clause irritant in the bond, and that the party within ten days after the term made offer of the money. Hope, (Clause irritant) July 1609, Earl Morton *contra* Douglas. ----- By a contract of victual, the buyer was bound to pay ten merks for ilk boll of 6000 that should be delivered by the seller to James Riddel, the seller always obtaining James Riddel's receipt thereupon; which delivery and receipt were to be betwixt and a certain day, and the receipt to be delivered to the purchaser before payment. This contract was found to be conditional, and the purchaser was affoizied, receipts not having been taken in terms of the bargain, nor the delivery made at the day agreed upon: For it was argued, That the term in this contract was not a term of performance, at which the seller became bound to deliver, because here the seller was not bound at all. It was therefore a conditional term, as if it had been said, That for every boll of victual the seller delivers within such a time, the other party shall be bound to pay him ten merks. Stair, 18th July 1667, executors of the Earl of Dirleton *contra* Duke Hamilton. ----- A relict renouncing a part of her liferent for the maintenance of the family, by contract with the friends, who became obliged to undertake to satisfy creditors for the standing of the family, and

yet they disposing of the estate, or suffering creditors to evict it; the Lords found the renunciation null, and that she had still right to the whole, even as to these friends who paid their parts; the whole debt not being paid, nor the family preserved, which was the only end of her renouncing. Gosford, 23d December 1675, creditors of Moufwal *contra* Lady Moufwal.

Prestations
in mutual con-
tracts good a-
gainst assign-
ees.

A DONATAR of bastardy pursuing for the price of lands sold by the defunct, was found obliged to implement the mutual cause. Stair, 20th June 1671, Alexander *contra* Lord Salton. ---- A donatar of escheat was not found to have right to crave implement of a contract, without performing the mutual cause. Stair, 13th December 1672, Lord Lyon *contra* feuars of Balveny. ---- A similar case, 7th February 1673, Dick *contra* Murdoch. ---- A husband having received part of the tocher from the wife's father, at whose instance execution was to pass; and in the receipt obliging himself not to crave the balance till he should implement the contract on his part: In a process at the instance of one to whom the husband had assigned the said balance, the Lords found, That he could not insist for the remainder of the tocher, tho' he was a singular successor, until the contract of marriage was fulfilled on the husband's part. Home, January 1685, Lawrie and Robertson *contra* Lawson. ---- In a process of adjudication at the instance of an assignee for part of his cedent's wife's tocher, the cedent not having performed his part of the contract of marriage; the Lords, nevertheless, allowed the adjudication to proceed, but with the burden of the obligation in the said contract in favours of the wife. Home, February 1686, Shearer *contra* Cargill. ---- Found, That an assignee to a tocher by the husband had right thereto; but with the burden of the conditions contained in the husband's contract of marriage, and that it behoved him to find caution to take it in these terms. Fountainhall, November 1687, Forbes *contra* Schaw. Spotiswood, (*Contract matrimonial*) 17th July 1627, Logan *contra* Hamilton. ---- Process was not sustained at the instance of an assignee to a bond for the price of land, until he obtained from his cedent, who was then minor, a ratification of his alienation after his majority, which the cedent was obliged to grant, by a separate backbond of the same date; but the buyer was obliged to pay annualrent to the assignee yearly till the sum should be paid. Durie, 14th November 1628, Cuming *contra* Cuming.

One in possession by a voluntary deed, cannot invert his possession in prejudice of the grantee.

FOUND, That a wadsetter having been once in possession, could not invert it, by designing himself in the discharges as factor for another who was an appriiser, for tho' that other was preferable, yet the wadsetter ought not voluntarily to have ceded possession, but only when legally turned out of it. Fountainhall, 24th March 1685, Glendinning and Maxwell *contra* Glendinning and Corfan. ---- A tacksmen having deduced a comprising against the lands which he had in tack, was not allowed to attribute his possession after the tack was expired to the comprising, in competition with a prior compriser, who was insisting in a removing, *quia nemo potest mutare causam suae possessionis*. Durie, 25th March 1628, Blackburn *contra* Gibson. Durie, 30th January 1629, *inter eosdem*.

AN appriſer having entred into poſſeſſion of lands, it was found, That he could not thereafter invert his poſſeſſion, and aſcribe it to any other title : Whether the right was in his perſon antecedent to the appriſing. Forbes, 4th January 1712, Murray *contra* Murray : Or if it was purchaſed by him during his poſſeſſion upon the appriſing. Spotiſwood, (*Dominion*) 15th January 1624, Earl Annandale *contra* Scot. Home, March 1683, Grant *contra* Grant. --- A man may defend upon any right he has in his perſon, and this will not be aſcribing his poſſeſſion to one right more than another : But if he purſue upon one particular title, as on a gift of eſcheat, a right of life-rent, &c, he cannot afterwards vary, and aſcribe his poſſeſſion to another title, and pretend he bruikd by an appriſing, becauſe he hath made his election. Fountainhall, 7th December 1686, Dickſon *contra* M'Culloch.

The ſame holds with regard to legal diſponees.

THE Lords found, That if a perſon who has heretable right to lands, ſhall thereafter take a tack thereof ; he may be decerned to remove from the ſame (notwithſtanding his heretable right) at the iſſue of the tack, without prejudice of his heretable right *in judicio petitorio*. Colvil, November 1583, Cunningham *contra* Cuik. --- The like. Haddington, ult. November 1592, Leſlie *contra* tenants of Newabby. --- In a declarator of redemption of lands, the Lords found, That the concluſion of the libel, craving the defender to be decerned to renounce all right and title which he had to the lands any manner of way, ought not to be ſuſtained ; and that no ſentence could follow, but to decern the defender to renounce all right which he had to theſe lands derived from the purſuer, and no further. Durie, 22d February 1631, Murray *contra* Lord Yeſter. --- Yet ſuch a declarator was ſuſtained, only the Lords allowed the defender to condeſcend upon any ſeparate right he had to the lands, which they declared ſhould be reſerved to him as accords. Stair, 2d February 1676, Duke Lauderdale *contra* Lord Yeſter. --- An appriſer having ſet a tack of the appriſed lands, the tackſman led a ſecond appriſing within year and day ; and in a removing defending himſelf upon his appriſing, it was objected, That he could not invert his maſter's poſſeſſion. The defender answered, That he took not aſſignation to any new debt, the appriſing being led upon an old debt due to his father. The defence was ſuſtained. Stair, 15th June 1666, Taylor *contra* Kniter. --- The wadſetter upon redemption is bound to reſtore the poſſeſſion, notwithſtanding of any ſeparate right he may have in his perſon, which will be reſerved to him to inſiſt upon as accords. Stair, 22d November 1677, Stewart *contra* Duke of Hamilton. Spotiſwood, (*Poſſeſſion*) 1591, Harris *contra* Anderſon. The wadſetter muſt alſo redeliver *vacua poſſeſſio*. Stair, 17th February 1665, Pringle *contra* Ker. --- A wadſet-right being comprised, and the comprifer making requiſition of the ſums due upon the wadſet, and purſuing the debtor's heir ; the Lords found, That the purſuer ſhould put the defender in poſſeſſion before the defender were obliged to pay, tho' the purſuer was not in poſſeſſion himſelf, yet had done *quantum in eo erat*, by obtaining declarator of extinction of a former comprifing, ſo that the defender might eaſily recover poſſeſſion. Dirleton, 9th February 1676, *contra*

Poſſeſſion muſt be reſtored at the termination of the right.

Incumbrances affecting the subject transacted by the disponee, cannot be extended against the disponent bound in warrandice, further than to pay the transacted sum.

A PURCHASER who has transacted an incumbrance affecting the lands, has no action against his author bound in warrandice, but for the transacted sum. Haddington, 7th February 1610, Lady Baikby *contra* Crawford. Durie, 8th March 1632, Ld. Balvie *contra* Ld. Lufs. --- A purchaser of lands holding ward, taking the seller bound in absolute warrandice, and also to obtain the superior's consent, if he purchase the gift of recognition himself, he may pursue upon the warrandice, but can only recover what he paid to the superior for it, and his charges. Durie, 1st July 1634, Glendinning *contra* Barnbarroch. --- Lands wadset being evicted by my Lord Errol the superior, for not payment of the feu-duty for years before the wadset; the wadsetter agreed with, and got a great ease from the superior, being his advocate; and thereafter pursued a recourse of warrandice upon the eviction, claiming 2000 merks as the sum agreed to be paid to the superior, and 500 merks for his pains and expences in agreeing with the superior. Alledged for the defender, That he could be no further liable for eviction, but for the true damage sustained thereby; and had the superior confirmed the wadsetter *gratis*, there could have been no ground of eviction. Answered, There being no abatement given at the agreement, but at the payment, upon personal consideration of services done to the superior, the defender can have no benefit thereby. The Lords found the defender only liable for the sums truly paid out to the superior by the pursuer, and the expences he was at probable by his oath. But there being a part of the composition paid to the superior, they allowed large expences, and modified 1000 merks instead of 2500 claimed. Marcus, (*Warrandice*) March 1684, Mr. Alexander Birnie *contra* Frazer of Techmurie. --- Found, That a wadsetter can purchase in no right to compete with the reverfer's right to the lands, upon which his own wadset is founded; because having the reverfer bound in warrandice, he becomes mutually bound to do all in his power to prevent incurring the warrandice: And therefore, when he purchases in a collateral right to the lands, the law presumes it to be done *eo animo* to fortify their common title, upon which account he has a claim against the reverfer for the expence of the purchase, in so far as *utiliter gestum*, in saving from eviction. And thus wadsetters and simple purchasers of lands are upon the same footing. 6th February 1730, Ramsay *contra* Clapperton. --- A person having entered into a minute of sale of lands with the heretor, who had been year and day at the horn, and obliged himself for the annualrent of the price from a term, and thereafter adjudged the lands in implement; and for further security, having taken and declared a gift of the seller's escheat affected with a backbond to the exchequer; the Lords ascribed his possession to the minute of sale, and found him accountable for the annualrent of the price to the creditors, after deduction and allowance to him of the expences of the gift, and the whole prestations contained in his backbond; in respect it was not lawful to take the said gift with any other view than as a security for his purchase. Forbes, 7th July 1708, Lord Alexander Hay *contra* creditors of Spot. --- A wife having disposed her estate to her second husband, upon his granting backbond to provide her to a liferent of the whole, and the children to be procreated betwixt them to the fee of the equal half; and he having acquired a former right made by his wife to her first husband's father, after that he the second husband had entered to and continued

continued many years in peaceable possession by virtue of the disposition to himself; the Lords found, That the second husband could not found upon the supervenient right, to exclude the only child of the marriage from the benefit of his backbond. Forbes, 24th July 1706, Carruthers *contra* Carruthers. ---- A man having granted double dispositions of the same subject, one of the disponees, after having been infest and in possession for many years, purchased the other disposition upon which infestment had not been exped, and insisted against the disponer for the price; the Lords considered, that purchasers acquiring in rights affecting their lands, could not extend them against the seller beyond the price paid; yet in this case, the disposition purchased could not be looked on as an incumbrance, seeing it could never compete with the pursuer's right, upon which infestment was exped; therefore they found the pursuer *tanquam quilibet* might insist upon his disposition for the whole legal effects thereof. Fountainhall, 16th June 1699, Beton of Tarvet *contra* Paterfon of Dinmuir.

By accepting of a gift of bastardy the donatar becomes liable to the defunct's creditors *secundum vires*; and there is a *jus quæsitum* thereby to the creditors, after which the donatar is not at liberty to purchase in any separate title to the subject to compete with the creditors: And therefore a donatar, after decret was taken against him by the creditors, having suspended upon a gift of the defunct's liferent escheat, taken by him after the decret, the reason of suspension was repelled, and the donatar only allowed the expences of the gift of escheat. Marcus, (*Bastardy*) November 1685, Galbraith *contra* Gib.

UNTIL all parties mentioned as contracters do subscribe, there is locus pœnitentiæ. See Locus pœnitentiæ.

IN a mutual contract both must stand bound, or neither. See Locus pœnitentiæ.

The End of the First Volume.



